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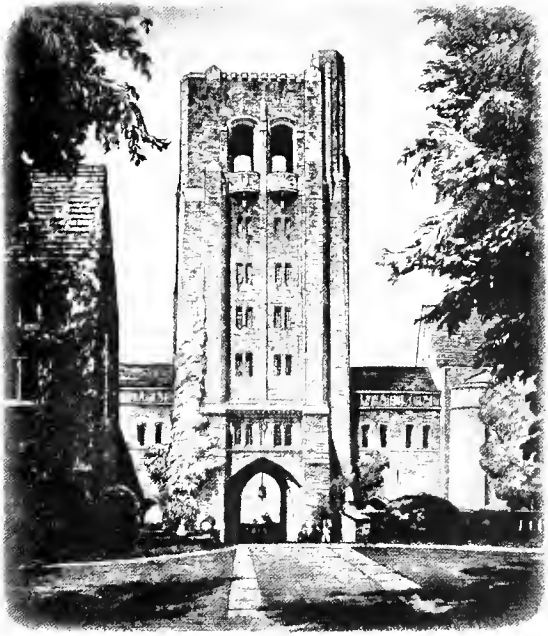

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AN EPITOME

OF

PERSONAL PROPERTY LAW.

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By W. H. H. KELKE.

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AN EPITOME

OF

PERSONAL PROPERTY LAW

BY

W. H. HASTINGS KELKE, M.A.

OF LINCOLN'S INN, BARRISTER-AT-LAW

AUTHOR OF "AN EPITOME OF REAL PROPERTY LAW," ETC.

"Res mobilis . . . sicut Leo, Bos, vel Asinus, vestimentum, vel aliud quod consistit in pondere, vel mensura."—BRACTON.

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PREFACE.

The following pages, supplementary to an "Epitome of Real Property Law," deal with Personal Chattels. The subject is in some ways harder to epitomize. Since Bracton's artless enumeration quoted on the title page, personal property, especially in the form of choses in action, has ramified in all directions and become closely entangled with law of contract. None of the general treatises, in my opinion, make sufficiently clear the distinction between these two, property and contract: perhaps I have succeeded little (if at all) better than my predecessors, though I have tried to keep off contract, except where necessary for explaining the nature of certain kinds of property.

Another difficulty lies in the multiplicity of statutory regulations. Here I have attempted to cull those only which affect property as such in its creation, the extent of its enjoyment, and most of all in the methods of its conveyance.

It is assumed that the student is now competent to deal with a somewhat increased number of cases. The specimens of instruments set out in full or in shortened form are founded partly on documents, which are, or have been, in my own possession, partly on statutory forms, partly made up from comparison of the best authorities.

W. H. H. K.

LIVERPOOL,
December, 1900.

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ABBREVIATIONS.

A. C.	Law Reports, Appeal Cases.
B. A.	Bankruptcy Act.
B. & C. . . .	Barnewall & Cresswell's Reports.
Car. & K. . . .	Carrington & Kirwan's Reports.
C. B.	Common Bench Reports.
C. B. N. S. . .	Common Bench New Series.
Co. A.	Companies Act.
E. R. P. . . .	Epitome of Real Property Law.
M. L. A. A. . .	Mercantile Law Amendment Act.
Russ.	Russell's Reports.
S. G. A. . . .	Sale of Goods Act.
St. Fr.	Statute of Frauds.
St. Fr. A. A. . .	Statute of Frauds Amendment Act.
St. Tr.	State Trials.

CASES.

*Those marked * are recommended for notice.*

STATUTES.

PERSONAL PROPERTY.

CHAPTER I.

ABSOLUTE PROPERTY.

THE chief distinctions between Personal and Real Property were considered in the "Epitome of Real Property Law." We there saw that Personal Property or Personalty was so called from the nature of the old corresponding action; that the more ancient name was "goods and chattels"; that chattels included "Chattels Real," viz., Leaseholds and some other interests in land carved out of real estate, which were accordingly there treated of at some length. There now remains the law concerning "Chattels Personal" or Pure Personalty. This embraces all movables except heirlooms and a few other minor kinds, and is concerned with property therein, together with various analogous rights which have come to be treated as property. As regards the subject-matter or things owned (objective property) as personalty, the old recognized division is into "Choses" (or Things) in *possession* and

Choses in *action*. This division we retain, though it is not quite satisfactory because not truly exhaustive.

I. Choses in possession are unfixed movables perceptible by the senses and thus capable of actual physical possession. They formed the whole of what was recognized by early Law as personal property, but are now much the smaller part of the nominal personalty owned by the people of this country. They may be divided into four natural classes. These are (1) animals, among which cattle (*catalla*) were perhaps the first with which Law concerned itself, and which thus furnished the general term "chattels"; in these, if *domitæ naturæ*, there is ordinary full right of property with or without actual possession; if *feræ naturæ*, there is at C. L. limited property only while they are actually possessed in confinement. Things may be (2) vegetable things severed from realty: (3) inorganic or mineral things when similarly severed, under which is included water in cisterns, &c.: (4) manufactured products of all kinds—*e.g.*, gas in pipe (*Reg.* v. *White*). This last class is the largest and practically the most important.

The rules as to class (1) are complicated by Game Laws. Game includes primarily, by Game Act, 1831, hares, pheasants, partridges, and grouse, and for some purposes certain other birds and also

rabbits. It may only be killed in general by certificated persons. *Primâ facie* occupier and his licensees have sole right of so killing on land occupied; if killed thereon by any other, property vests in occupier. But *semble* if A. drives game off B.'s land on to C.'s and kills it there, property is in A.,* even though his act is punishable, unless it was driven off ancient forest or free-warren belonging to B. as a franchise, when property still remains in B. Again, if B. is leaseholder, right to kill and take may have been expressly reserved in lease in favour of landlord or some other: in this case, by Ground Game Act, 1880, B. has indefeasible *concurrent* right with landlord or such other to kill ground game—*i.e.*, hares and rabbits, without game license, by himself or by one nominee in writing, being one of his household, servant, or other employed for reward. It should also be noticed that various animals are treated by the law as wild or tame for different purposes, especially such as are in the habit of straying—*e.g.*, dogs, cats, pigeons, &c. As to many of these ownership is so far recognized that their destruction or abduction is larceny by statute, in others ownership is protected only by civil action of tort.

* Some doubts have been expressed whether this was so even at C. L., and whether, even if it were, it remains law since Game Act, though it may be so as to wild animals other than game.

The chief point that presents itself with respect to classes (2) and (3) is whether there is sufficient severance. The question may arise on sale: if there is not complete severance, this is sale of interest in land, governed by s. 4 of St. Fr.; if there is, the contract is regulated by s. 4 of S. G. A. Particulars will be found in works dealing with these statutes or with general Law of Contract. Or the question may arise on death, whether such things devolve as realty or personalty—*e.g.*, where trees are blown down and wholly or partially uprooted, degree of severance is a question of fact in each individual case (*Re Ainslie*).

As to class (4), manufactured products, many points in reference to these will be found in almost every chapter. One general point may be noticed here. If A., without acting on B.'s direction, manufactures a product with raw material belonging to B., does the finished product belong to A. or B.? English law does not furnish any broad direct rule. Where A. obtained the material by means amounting to a crime, on his conviction the Court might sometimes by restitution Order restore to B. his property in its changed form. Where A.'s act was non-criminal tort, B. would always have action for damages, and *semble* where the change wrought by manufacture was small so that the product did not really amount to a *nova species*, there might sometimes be an Order

for delivery enforceable by writ. But generally in case of accident or *bonâ fide* mistake of A., and provided he is not trustee expressly or constructively, the *possession* of the manufactured product would rest with him, subject to payment of value of materials, and nominal or substantial damages, and (in practice at least) the *property* therein would follow the fact of possession.

II. Chose in action signifies (1) *right of suing* for a sum of money; (2) *amount* so recoverable; (3) sometimes *document* creating or else evidencing the right. Each of these meanings generally connotes the other two. Treating choses in action as embracing all forms of personal property not involving actual possession or right of possession as a necessary incident, they are conveniently divisible into two classes. Class I. embraces those of determinate or definite value, comprising (1) *Debts* due to creditor, who is thus "owner" of the chose in action; (2) *Liquidated damages* arising out of breach of contract, or out of tort when ascertained by verdict or otherwise. Debts may be legal or equitable, secured or unsecured, present or future, certain or contingent. Particular forms are (a) Legacy due from executor; (b) Annuity under will, settlement, or otherwise; (c) sums due on Negotiable instruments; (d) investments in Public Funds; (e) sums provided by Policies of insurance; (f) company

debentures; (g) Colonial and Foreign Bonds and Stock. All these being of determined value are choses in action in older or stricter sense. Class II. is formed of those whose value is indeterminate, indefinite, or speculative; as Partnership or Company shares, Options, Patent-rights, Copyright, Trade-mark, and Goodwill. These are choses in action only in wider or more modern sense. Indeed the last four, being rights *in rem* relating to *acts* and not necessarily involving any so-called "corporeal thing" capable of possession, are here classed with choses in action proper mainly on the ground that they are obviously not choses in possession as above defined. They might be erected into a separate division as "Choses in quasi-possession"; * but if we retain the historical two-fold division of chattels personal, it is more convenient, as regards Law of Property, to arrange them with choses in action. Choses in possession may be compared with land in actual seisin or possession; choses in action of class i. somewhat resemble "rights of possession" or "of entry" on land; and those of class ii. have analogies with incorporeal hereditaments.

While rights of property or ownership are rights *in rem*, every chose in action (in the stricter sense) is in its inception a right *in personam—i.e.*, not against all the world but against some particular

* *v.*, pp. 109, 141.

person or persons who in pursuance of the right may be sued to enforce it. Hence such rights originally carried no notion of property. But as a number of rights *in personam* are rights of contract, and a majority of contracts are rights *ad rem*—*i.e.*, for purpose of *acquiring* property of some kind—it is not wonderful that such rights or many of them have come to be regarded in most respects as rights *in rem*, especially where by usage or statute they have become *transferable* from one possible plaintiff to another, just as tangible property is transferred from owner to owner. It is from this—viz., the Conveyancing point of view—that we are to regard both divisions of Personal Property, touching on questions of contract, tort, and crime only incidentally so far as they are inseparable from our main subject of Property Law.

Things personal, whether in possession or action, are capable of different kinds of ownership (subjective property) corresponding to most of the divisions known in Real Property Law. In the first place ownership may be (1) Absolute or General, (2) Qualified or Special. The former we saw existed in practice, though not in theory, as to land: it exists in theory no less than in practice as to things personal. The latter will be considered in Chapter II.

Where the second does not exist—*i.e.*, where no other than the general owner has rights in the

thing, the essence of ownership is that it is *exclusive*, alike as to possession, enjoyment, and disposition of the thing owned.

Again, ownership may be several, joint, or in common. Joint ownership, like joint tenancy, has the four unities of interest, title, time, and possession, with a similar exception—viz., that unity of time is essential under a deed, not under a will. The incident of survivorship also applies where joint ownership extends beyond joint lives of all the owners. Partnership property employed in commerce, manufacture, or business, is governed by special rules differing from those of ordinary community or co-ownership. (1) Partnership choses in possession are subject to joint ownership *without* survivorship, for *jus accrescendi inter mercatores locum non habet.* (2) Choses in action remain to survivor or survivors, who alone can sue on them, but to extent of deceased partner's share in trust for his personal representatives. (3) Legal estate in partnership land held jointly in fee survives subject to similar trust. Thus, if A., B., C., partners, have land "substantially involved in the business" (*Ashworth* v. *Munn*), stock-in-trade, and book-debts, and A. dies leaving D. his executor, the stock vests in B., C., D.; legal estate in the land and right to sue for book-debts in B. and C. only, but as to A.'s share in trust for D. and through him for benefit

first of A.'s private creditors and then of his legatees. It will be seen that partnership must arise by *agreement* and involve *sharing profits*; neither of these is essential for other co-ownership.

Joint interest in property and profits naturally carries joint liability. Persons jointly liable, as between them and creditors, are each liable for the whole (with right to *contribution* as between one another); hence all who are liable have right to be sued together, and release to one releases all, with two exceptions; (1) discharge of *bankrupt* does not discharge his co-debtor (B. A.), (2) discharge of actionability under St. of *Limitation* does not discharge any co-debtor who has given acknowledgment or made part-payment (St. Fr. A. A.). *Dormant* partner who secretly shares profits, and *ostensible* partner who "holds himself out"—*e.g.*, by allowing firm to use his name, paint it over door, &c., are jointly liable with ordinary partners. Participation in profits is *primâ facie* but not conclusive evidence of partnership, especially under Partnership Act, 1890, as to (1) debt payable by *instalments*, (2) *remuneration* of servant or agent, (3) *annuity* to wife or child of deceased partner, (4) loan with interest evidenced by *writing*, or (5) periodic payments to vendor of business and good-will, when varying in all five cases with rate of profits. These and suchlike provisions have

important bearing on valuation of property consisting in choses in action maintainable against actual or alleged partnership.

Ownership in common (often less correctly termed "tenancy in common") may arise by (1) subsequent derivation from original joint ownership, or (2) original conveyance in common, as deed, writing, or will, sufficiently denoting intention, in a deed generally by words "as tenants in common," in will or other writing either by the same form or simply by the words "equally," "between them," &c. Choses in action, whether in strict or wide sense, cannot at Law be owned in common, except *Letters patent*, but in Equity joint ownership in any chose in action may be severed, and one or more of legal owners may be trustee or trustees for another or others, or for representatives of deceased owner, their interest being either in common or in severalty.

Successive interests in chattels personal cannot at law be given in a will by way of direct Executory Bequest, but may in will or deed be given by *vesting in trustees* on trust for successive beneficiaries; *e.g.*, "on trust for A. for life and from and after his decease for B.," &c. Such trusts have of course nothing to do with St. of Uses, which does not apply to personalty.

Choses in possession in absolute ownership are

alienable (1) by *delivery*, (2) by *deed*, (3) in many cases by *simple contract* of sale without delivery.

1. Delivery of possession occurs in (a) Gift, (b) Sale, (c) Bailment. In early Norman times "livery of seisin" was a term used alike in alienation of land and of chattels: it was only later and by degrees that "seisin" became confined to feudal possession of freehold, "possession" to chattels real or personal, delivery of which was the oldest form of legal transfer thereof.

In case (a) Gift, delivery by owner or his agent for this purpose, with *intention* of giving sufficiently manifested, passes property in chattels personal. Delivery may be *constructive—e.g.*, by handing over key of warehouse in which are donor's goods, marking heavy goods with donee's initials, with view to their removal in reasonably convenient time, &c. One form of gift, *donatio mortis causâ*, will be considered under Administration. Any delivery even if constructive, to transfer legal ownership, must be *real—i.e.*, intended to pass possession as well as property. But verbal or written Declaration of Trust for donee without delivery may give *equitable* interest—*e.g.*, letter giving donee fourth share in owner's racehorse (*Cochrane* v. *Moore*); in this particular case actual delivery of such share is obviously impossible.

Delivery on (b) Sale generally requires ownership by vendor, for *Nemo dat quod non habet,* and by S. G. A. ownership is made *primâ facie* essential condition of contract, except (i.) where apparent vendor is mercantile or other agent selling by express, C. L., or statutory power his principal's property, and (ii.) on sale in Market overt. The subject of (i.) belongs to general law of sale of goods* and of agency; it includes "agency by estoppel"—*i.e.*, where owner by conduct permits vendor to be taken for owner or owner's agent. As to (ii.), on sale in market overt of goods *stolen* from subject (not Crown), *bonâ fide* purchaser obtains title, defeasible, however, on thief's conviction, when by old C. L. principle, recognized at least as early as Ed. I. and embodied in Act of Hen. VIII., and now in Larceny Act, property revests in original owner. On such sale of goods when obtained by *false pretenees,* seller may have no title at all to give—*e.g.*, if he obtained by pretence as to identity or otherwise, so as to preclude existence of any contract (*Cundy* v. *Lindsay*); or again he may have title resting on *voidable* contract, whereupon *bonâ fide* purchaser obtains good title, and property does not revest in original owner merely by offender's conviction (S. G. A. altering Larceny Act and *Bentley* v. *Vilmont*), but

* *v.* p. 14.

semble may by other means—*e.g.*, restitution Order of Court. "Market overt" is place and time customary for sale of such goods in ancient market, including in City of London any shop at any time where and when *such* goods are wont to be *publicly exposed* for sale: hence it does not include a warehouse or back or upper room, nor *semble* sale over counter *to* owner of shop (*Hargreave* v. *Spink*). Delivery for value of currency *as currency*, even of stolen money, gives good title to *bonâ fide* transferee, but not where stolen coin was kept as *curiosity* by owner and is *sold* by thief, not passed as currency (*Moss* v. *Hancock*).

Sale of horses is regulated by a statute of Philip and Mary and one of Elizabeth. Property in stolen horse is transferred even by *bonâ fide* possessor only (i.) in market overt, and then (ii.) only after exposure of horse for one hour between 10 A.M. and sunset, and (iii.) entry of particulars in book-keeper's book, and horse may still be recovered on proof of original ownership within 40 days and tender to *bonâ fide* purchaser of price he paid for it.

Delivery under (c) bailment, *e.g.*, loan, works no alienation of *general* property, though it may be remarked that long possession thereafter by bailee may make it difficult for original owner to prove fact of ownership. Special property or qualified ownership of bailee will be treated in Chapter II.

2. Deed is required for gift without delivery to pass *legal* ownership (*Cochrane* v. *Moore*). Also as "Bill of Sale" in some cases of consideration—*e.g.*, sale or mortgage of ships, mortgage of many kinds of chattels, &c. And it *may* be used in sale of any chattels where circumstances are exceptionally important.

3. Simple Contract of sale passing property in goods is now, by S. G. A., termed "Sale" (formerly "Executed contract of Sale"); if without delivery, it is "Bargain and Sale." Property passes *without* delivery by contract itself, if such is intention of parties, and goods are ascertained and deliverable at date. If not ascertained or not deliverable at date, it passes (subject to intention as gathered from terms conduct and circumstances) on *notice* to vendee that they have been made deliverable, or weighed, measured or tested to ascertain price, and unconditionally appropriated. In any other case property passes on delivery, unless this is (a) "on sale or return," when it passes (i.) on approval, acceptance, or adoption, (ii.) on expiration of fixed time, (iii.) if none, of reasonable time; or is (b) a delivery to purchaser, or to carrier or other agent for him, with express or implied reservation of *jus disponendi*, when it passes on fulfilment of attached condition—*e.g.*, payment, acceptance of bill of exchange, &c. When value is £10 or more,

contract falls under s. 4 of S. G. A., rules of which as well as of corresponding parts of St. Fr. and St. Fr. A. A. (Lord Tenterden's Act) belong to Law of Contract. Contract of "hire-purchase" of furniture, &c., may or may not amount to Sale; if without clear contrary intention, it does (*Lee* v. *Butler*), enabling the so-called hirer as agent within S. G. A. and Factors' Act, to make good title to *bonâ fide* purchaser; *secus* if written contract sufficiently expresses hirer's option not to purchase after all, whatever his disposition at date of contract (*Helby* v. *Matthews*).

Property in chattels "draws to it the possession," and vendee on tender of price, or without tender in sale on credit, is entitled to delivery. But if before delivery on credit he becomes insolvent, vendor may retain goods till payment, which vendee or his trustee in bankruptcy may make in reasonable time; if not, vendor may disown contract, resell, and prove for any loss (*Ex parte Stapleton*). If property has passed in goods in hands of carrier by land or sea, unpaid vendor on news of insolvency of vendee may stop *in transitu* by directing carrier to redeliver to him or his agent. This will further appear under Bills of Lading.

Where chattel has ceased to be in actual possession of owner through accidental loss or crime of another, and comes into hands of police, by Police Act,

1897, magistrate may order delivery to "supposed owner," without prejudicing true owner's right to recover it.

Ownership may be vested in individuals, in corporations of all kinds, and in various unincorporated bodies, generally under statute in trust for local or other class; *e.g.*, by Local Government Act, 1894, Parish Councils may hold personal property for parish purposes; so may Borough Councils under London Government Act, 1899, to same extent that vestries formerly did in name of ratepayers. Where personal property is vested in a married woman or in trustees for her since 1882, it will be to her separate use, subject to provisions of any settlement, and will not, as at C. L., belong to her husband *jure mariti*. Where vested in an infant, it or any part may be conveyed to trusts of marriage settlement made under sanction of *Court*, provided infant if male is 20, or if female is 17 years of age.

CHAPTER II.

QUALIFIED PROPERTY.

QUALIFIED (or Special) Property is a term which might designate any right of property short of ordinary full ownership—*e.g.*, rights over wild animals in confinement, right of finder of chattel against all the world except true owner, of sheriff holding debtor's goods under execution, of unpaid vendor to stop *in transitu*, &c. It is here applied only to *definitely limited* rights of property accompanied or connected with possession and arising out of express or implied agreement between owner and (generally) possessor. Such are rights *in rem* subsidiary to rights *in personam*, as found in Bailment, Lien, and Mortgage of chattels, differing not as to things owned (objective property), but as to forms of ownership (subjective property).

Qualified property being thus connected with *possession*, we notice here the different meanings of this word. Popularly, it is any apparent control or physical detention without reference to circumstances under which it arises—*e.g.*, where A. for any reason holds in his hand B.'s book, knife, &c. Legal

possession may be (1) *de facto* without claim of general or qualified ownership—*e.g.*, by servant of chattel received from stranger *in transitu* to his master. It is (2) in law, which may be (a) *bonâ fide*, and this (i.) by owner, property and possession concurring; (ii.) constructive, where legal possessor has lost actual possession without actual occupation by another—*e.g.*, purse or keys dropped in field; (iii.) by bailee or other with express or implied consent of bailor; or (b) *malâ fide*, as possession by thief or tort-feasor. We see that a (iii.) is the form which gives rise to qualified property in the sense with which we are here concerned.

I. Bailment is delivery of his chattel by bailor into possession of bailee on trust for *particular purpose* and subsequent re-delivery to bailor or his nominee. Bailments are (a) *Simple* (non-exclusive) and (b) *Exclusive*. (a) Simple bailments are (1) Deposit for safe custody—*e.g.*, in inn, warehouse, &c., (2) Gratuitous Loan, (3) Carriage of goods, (4) Possession by Factor or other Mercantile agent: in these bailor is deemed to have legal possession, bailee holding as his agent. (b) Exclusive bailments are (1) Pledge (or Pawn), (2) Hire: in these bailee alone has possession. In cases under (a) bailor *or* bailee may sue for recovery of goods wrongfully taken by third person during time of bailment: under (b), bailee only. Bulk of rules regulating

bailment belongs to Law of Contract; here we notice only conditions under which certain bailees can convey rights of property. Such bailees are Innkeepers, Pledgees, and Factors.

1. At C. L. unpaid innkeeper had only passive right of detention of goods of his guest; but by Innkeepers Act, 1878, he may sell luggage, horses, and carriages left with him after six weeks of arrears and advertisement of intended sale by auction.

2. Pledge at C. L. gives right of *possession* while debt is unsatisfied, and right of *sale* if debt is not paid in stipulated time (if any), otherwise after demand and reasonable notice. Pledges to pawnbroker for loans not exceeding £10 fall under Pawnbrokers Act, 1872; by this (a) unredeemed pledge for 10*s*. or under, after twelve months and seven days' grace, becomes absolute property of pawnbroker; (b) if between 10*s*. and £10, pledge is redeemable even after such period until sold by auction, any surplus beyond loan, interest, and costs to be accounted for on demand made within three years. If pawnor wrongfully pledges goods not his own, Court on his conviction may order delivery to true owner, with or without repayment to pawnbroker. (c) Beyond £10, the Act does not apply, and case is governed by C. L. rules.

3. Factors or other mercantile agents having possession of principal's goods for sale could not at

C. L. *pledge* them, and could give title on *sale* only if authorized expressly or by usage of trades. But by Factors Act, 1889, (a) *bonâ fide* purchase from factor is valid in spite of revocation of authority if *unknown* to vendee; (b) *bonâ fide* advance to factor on security of goods pledged by him makes pledge valid against real owner, notwithstanding *notice* that pledgor was merely factor. Thus, in spite of private directions of principal, factor can pass absolute or qualified property.

Formerly bailee wrongfully detaining chattel could turn qualified into absolute property by paying assessed value; now writ of execution for *redelivery* may be obtained under O. xlviii. r. 1, enforcible (if chattel cannot be found) by distraining on bailee's land and goods until it is produced or accounted for.

II. Lien is passive right of *detention* of chattel without power of sale pending satisfaction of some pecuniary demand, arising by express agreement or more frequently by implication of Law or Usage. Liens are (1) Particular, where debt arises *in respect of chattel* thus detained—*e.g.*, in case of miller, horse-trainer, carrier, warehouseman, and generally of vendor and maker or repairer of goods for costs of work respecting same; all these are "favoured by Law" and construed liberally: (2) General, for *general balance* of account between parties, *e.g.*, of solicitor to detain client's papers, of bankers,

innkeepers (at C. L.),* factors, &c.; all which are "taken strictly," and arise only by (a) *express* contract, (b) previous *course of dealing* between parties, or (c) general or local trade *usage*. When lien arises under (a), this cannot be made to override rights of third parties—*e.g.*, if A. consigned goods by carrier B. to C., and B. and C. arrange for *general* lien in favour of B. on all goods carried by him to C., this cannot prevent A. from stopping *in transitu*, should occasion arise. Lien is generally lost by giving up possession or by waiver, which may be implied—*e.g.*, by taking bill or note payable at distant date as security, but on dishonour thereof, or insolvency even during its currency, lien revives. He who detains chattel on ground of lien must take ordinary care of it.

III. Mortgage may be of any chattels in possession or in action. It differs from pledge and lien by passing full *legal ownership* without immediate *possession*, and from most cases of lien because it always requires *express agreement*. A deed under name Bill of Sale is required, on general principles, to pass property without possession. The law as to many of these is regulated by Bills of Sale Acts, 1878 and 1882, which somewhat tend to confuse two very different transactions—viz., *Absolute* Bill

* This is often described as *particular* lien, but its nature is general, extending to whole account of guest, not merely charge for custody of particular goods (*Mulliner* v. *Florence*).

or (more or less) voluntary settlement, and *Mortgage* Bill of Sale as security for loan. As transfer of Legal property without possession tends to keep up false credit on behalf of transferor, very similar precautions have been enacted in both cases.

The Act of 1878 includes every such transfer made by the bill of sale itself, except (1) assignments for benefit of *creditors* generally, (2) *ante-nuptial* marriage settlements, (3) transfer of *ships*, (4) transfer of goods in *ordinary* course of business, (5) bills of sale of goods *abroad*, (6) bills of *lading* and kindred documents, and (7) by Act of 1891 certain hypothecations of *imported* goods. Exceptions (1) and (3) are dealt with by other Acts.* Absolute Bills of Sale come under Act of 1878 only, Mortgage Bills under it as amended by Act of 1882. Both Acts apply in case of (a) movables generally, (b) fixtures and *growing* crops *separately* assigned, (c) *trade* machinery generally. They exclude (i.) all chattels dealt with by documents 1—7 above, (ii.) choses in action, (iii.) farming stock or produce irremovable at date by antecedent agreement or custom, (iv.) fixtures and growing crops assigned with *interest in land* even though severable, (v.) fixed engines and their appurtenances used in trade.

Mortgage Bill under Act of 1882 must be in

* *v.* pp. 27, 124.

favour of one grantee only (*Saunders* v. *White*),* and requires (1) *attestation* by any credible witness; (2) *registration* within seven days renewable every five years, priority between two or more Bills depending thereon; (3) true statement of *consideration* not less than £30; (4) *affidavit* containing date, residence, occupation of grantor and witness; (5) scheduled *inventory* of mortgaged chattels; (6) form "in *accordance* with the form in the schedule" to the Act. Any omission of, or material departure from, any one of these six requisites renders the bill of sale wholly void for all purposes as regards the chattels and between all parties, except that in regard to (5) omission in inventory leaves it good against *grantor*, and even as against *other creditors* than grantee as to (a) growing crops separately assigned, or (b) fixtures, plant, and trade machinery afterwards substituted for those in inventory. It will be seen that requisites (2) and (4) are for protection of other present or future creditors, while (3), (5) and (6) are for protection of grantor against lender, and (1) for benefit of both. Grantee may take possession on any one of five grounds only—viz., (i.) *default* in payment or non-performance of covenant (if any) for security; (ii.) *bankruptcy* or *distress* for rent, rates, taxes; (iii.) *fraudulent removal* of goods; (iv.) unreasonable non-production

* *Times*, November 24th, 1900.

of *receipt* for rent, rates, taxes; (v.), *execution:* on payment or otherwise remedying such ground of seizure within five days, grantor may apply to Court for relief.

The essentials of form under (b.) appear to be as follows:—

"*Date* and *Parties* (A., *grantor*; B., *grantee*). *Testatum* (conson and recet). *Operative words* (sd A. hby assigns unto B. exors &c. ALL AND SINGULAR several chattels and things specifically described in annexed Schedule by way of security for paymt of £ and intt thron at rate of £ p.c. p.a.). *Agreements* (time of paymt, instalmts, &c.). [Insurance &c. for maintaining security.] *Proviso* (chattels hby assed shll not be liable to seizure by sd B. for any cause other than those specified in s. 7 of Act of 1882). IN WITNESS, &c.

Signed and sealed by sd A. in presence of C."

No general rules can be laid down as to what particular variation will be in "accordance" with statutory form. The whole must be simple, "so plain that he who runs may read," and the legal effect of any form used must be neither greater nor less than that of schedule form. The following have been held to avoid Bill:—Assignment by grantor "as *beneficial* owner" (*Ex parte Stanford*); power to seize on *demand* (*Hetherington* v. *Groome*);

addition of *chattels real*, tenant right, &c. (*Cochrane* v. *Entwistle*). And Court looks through outward form at real nature—*e.g.*, assignment purporting to be absolute sale along with hiring back proved to be security for loan is void if unregistered (*Madell* v. *Thomas*).

Absolute Bills of Sale under Act of 1878 only are not mortgages, but it is convenient here to contrast them. The Act provides for (1) attestation, (2) statement of consideration, (3) registration. Under this Act (1) must be by *solicitor*, who must state that he had previously explained effect: (2) will frequently state "good" (not "valuable") consideration—*i.e.*, "natural love and affection," *e.g.*, in post-nuptial settlement. Default in requisites leaves Bill valid against *grantor;* it is void only as against trustee in bankruptcy, execution creditor, or sheriff and his officers, and only so far as relates to goods "in *apparent* possession" of grantor—*i.e.*, on land or in building, occupied, used, or enjoyed by him. Post-nuptial settlement of furniture by owner on his wife is a good example of absolute bill of sale within Act of 1878. Grantee of either absolute or mortgage bill of sale may transfer, and transfer does not require registration.

Mortgages of personal chattels not within Acts may be of choses in possession—*e.g.*, ships; more frequently of choses in action—*e.g.*, shares, stock,

insurance policies, patent rights, &c. They resemble mortgages of realty, and will be illustrated hereafter.* All such mortgages of chattels are by *assignment.*

"Lien" is applied to some statutory or other charges on property not in possession, *e.g.*, by Solicitors' Act, 1860, on petition of solicitor who has "recovered or preserved" property for client, Court may declare him entitled to charge thereon for taxed costs, charges, and expenses. In cases not provided for by Merchant Shipping Act unpaid seamen have by maritime law a first charge, called "lien," on ship and freight for wages, enforcible by proceedings *in rem* in Admiralty Courts. Maritime lien also arises on salvage, towage, pilotage, for necessaries supplied, &c.

* *v.*, p. 108.

CHAPTER III.

SHIPPING PROPERTY.

PROPERTY in ships with contracts incident thereto stands apart from that in other choses in possession, being subject to peculiar rules, both under Civil Law as administered in Admiralty Courts, and under Merchant Shipping Act, 1894. British ships (except a few small kinds) must be *registered* at port in U. K. or H. M. dominions abroad, and stand only in names of not more than sixty-four owners, each being either British subject natural-born, or naturalized and owing allegiance at date, or else corporation in British Empire. Whatever number of owners, the ship is deemed to be held in sixty-four shares. Fractional shares cannot be registered, except that five names may stand as joint-owners of ship, share, or shares. Owners or corporation officer must subscribe declaration as in schedule to Act, as to owner's qualification, building of ship, &c. Trusts cannot appear on register, but registered owner may in fact be trustee for person, persons, or company, and equities may be enforced by Court. Certificate

of registration corresponding to declaration is given out, on which may be indorsed changes of registered ownership; master may employ this in navigation and keep as against all other interests or charges claimed in ship.

Part ownership may be joint: if of share, there is (legal) survivorship; if of ship, none. Ownership in common is more usual, ship being managed by "managing owner" or by "ship's husband"—*i.e.*, owners' agent for making charter-parties and other contracts. If owners disagree as to using or keeping ship, Court in extreme case can order sale, or in other cases determine which shall have possession, or decide on particular voyage, &c.

Original ownership is by building, purchase from foreigner, or capture and condemnation in Prize Court—this last rare since Declaration of Paris, 1856, against privateering.

Transfer, whether absolute or as mortgage, of ship or share is alike by attested Bill of Sale in schedule form under Act of 1894, containing particulars corresponding to declaration, and fresh declaration by transferee. Certificate of title may empower owner's nominee in other country than that of registration to sell or mortgage under conditions until notice of revocation, death, or bankruptcy of donor of power. Mortgages rank in order not of creation but of *registration*. Mortgagee has power

of sale, but puisne mortgagee can sell only by consent of prior mortgagees. Mortgagee can also take possession and recoup himself out of freight and earnings. Transfer of mortgage (in schedule form) and discharge on repayment require registration.

New owners on proof of devolution by *death*, *bankruptcy*, or *marriage* of female (where not to her separate use) may be registered, representatives of each counting as but one owner under "Rule of 64." Alteration in description of ship may be registered, or ship re-registered, and port of registry may be changed on application of all owners (including mortgagees).

These are chief rules affecting ownership itself. Chief contracts and incidents affecting use and enjoyment are seven—viz., Charterparty, Bill of Lading, Bottomry, General Average, Salvage, other Maritime Liens, and Marine Insurance.

1. Charterparty (*charta-partita*) is letting of entire ship or *definite* part (*e.g.*, one of holds) for conveying goods on determined voyage. Parties will be (1) owner or owners, ship's husband, or master; (2) merchant or other hirer. It may be by *deed*, if made by owner, or under power of attorney from him (under seal); more usually by agreement with 6*d.* stamp, as by master. It contains *freight* (amount for hire); *burthen* or tonnage to be carried; *covenants* that ship is seaworthy and well-found,

will be ready at date, and after given number of "running" or "lay" days for loading, will sail to destination and unload in given number of lay days; and *provisoes* limiting liability in certain cases. There may also be *demurrage* for excess time over lay days, and sometimes *despatch-money* to be taken off freight for extra speed in loading or unloading. The agreement may run somewhat thus:—

"Dated at Bristol, day of

AGREED betwn A., master, on behalf of B., owner of good ship *Argo*, A1, of measurement tons, now lying at this port, and C. (charterer) That sd Ship being tight, staunch &c. shall sail to Odessa or so near as she may safely get, with all despatch, and load always afloat from Agts of sd C. full cargo not exceeding what she can reasonably stow above Tackle Provons &c., and sail to Hamburg or so near &c. and deliver on payment of Freight at rate of (Act of God, Queen's Enemies, Restraint of Princes, Fire, Perils of Sea &c., excepted). running days for loading . . . and unloading. Demurrage over sd lay days at Odessa and Hamburg respy at rate of p. d. Penalty for non-performance per ton not exceedg freight.

"(Signed A.
C.," 6*d.* stamp.

2. Bill of Lading is in form of *receipt* by master

of "General Ship"—*i.e.*, where he or owner holds himself out as Common Carrier, not letting any definite part; it contains terms of carrying, somewhat as follows:—

"A. B. No. 1 b. 25. } Shipped in good order by C. D. merchant on good ship *Mary Jane*, whof E. F. is Master at Hull bound for Stockholm, 24 boxes marked as per margin to be delived in like good order at Stockholm afsd (Act of God, Queen's Enemies, Fire, and all other dangers of navigon excepted) unto G. H. merchant or his assigns, he or they payg freight therefor at per box with primage and average. In Witness whof sd master has affirmed to these bills of lading of this tenor and date; one of wh being accompled, other two to stand void. (Signed) E. F.

"Dated at Hull, day of ." 6*d.* stamp.

Primage and *Average* are small dues paid by shipper to master, one for loading, the other for care and custody; they vary with custom of port. Even where whole ship is chartered, it is common to employ Bill of Lading also. We see that chartered ship is comparable with leased house, though shipowner generally (not necessarily) keeps control by appointing master and men. General ship is more like building used as inn or general warehouse. As to shipowner, bill of lading is his title

to freight: as to consignors, consignees, and others we shall see hereafter.

Delivery Orders and Dock Warrants are conveniently noticed here, though the former apply to land as well as sea carriage. In form they may be (1) mere promise by vendor to *particular* purchaser to deliver possession to his order; indorsement by such purchaser gives indorsee right to *possession*, but to *property* only if and so far as purchaser has it. Or (2) they may be and generally are framed as contract of sale to *holder in due course;* this passes *property* in goods to indorsee when made by a "mercantile agent," being "document of title" within Factors Act. "Through Bills of Lading," given by railway company for whole carriage by land and sea, and some similar mercantile forms, (a) give indorsee mere equitable charge, (b) are not documents of title within Act.

3. Bottomry is hypothecation of ship, with or without cargo and freight by or for shipowner, advance with interest to be repaid only if ship arrives at its destination. The contract is usually under seal (bottomry bond). *Respondentia* is hypothecation of *cargo* only under similar circumstances, valid only if cargo owners are to be benefited thereby. Bottomry bond is generally by master on voyage, under stress of necessity for repairs or stores, and master has implied authority to this effect.

Necessity being vital principle of hypothecation, money must be necessary in fact, not merely believed to be (The "*Pontida*"), and not obtainable on personal credit of owner or master. Two peculiarities are (1) risk of lender losing loan and interest by loss of ship, (2) risk of postponement to *subsequent* bond given under later necessity, later bond being payable *first* if ship insufficient to pay both, because later loan is proximate cause of ship reaching port. Proceedings may be taken *in rem* in Admiralty or Vice Admiralty Court, not in County Court. Bottomry bonds are frequently assigned for value, and assignee can sue *in rem;* such assignment may be either legal or equitable.

4. General Average is an incident arising also out of necessity, generally through *jettison—i.e.*, throwing overboard goods, &c., for ship's safety. General average is the rateable adjustment, usually made by experts called "staters," between those who have lost goods by jettison and the rest who have gained by their loss. Shipowners may be liable for delivering goods thus saved without providing for adjustment (*Crooks* v. *Allan*). General average may fall on merchant, shipowner, or both, but must arise out of loss intentionally brought about for *common safety*, whether by jettison of goods, cutting away masts and sails, burning spars and cargo for donkey-engine to work pumps (*Robinson*

v. *Price*), or otherwise. The principle descends to us from *Lex Rhodia* through Roman Law and medieval codes. So-called "Particular" average is any other loss to private goods not for general benefit, and so not rateably chargeable against others.

5. Salvage is compensation due from shipowner or merchant to persons who have voluntarily saved ship, cargo, or life from loss, or recovered property after actual loss from perils of sea or enemy. It seems to be the sole instance in English Law of claim enforceable against a man on ground of services without any express or implied contract, being equally due whether or not salvor was asked to assist. Salvor of goods abroad has lien on such goods, and shipowner on paying salvage is subrogated to his rights. If ship or goods are brought into U. K., goods must be delivered to Receiver of Wreck: claim against ship for less than £200, in absence of agreement, comes in first instance before two justices; larger claims before Admiralty Court. If A. save ship and goods, and B. life, A. is liable to contribute to reward of B. (*Cargo ex "Schiller"*).

6. Cases of charge on ship or cargo have already been noticed as giving rise to maritime lien. Details belong to Admiralty Law, but it may be observed here that different rights of qualified property in

shape of various liens may accumulate against absolute property in same ship. In such case the priorities are, briefly : Salvage, damages, wages, bottomry, necessaries. Any lien on *ship* is extinguished by (1) taking other security, (2) payment even by third person, (3) sale by Court, not by sale out of Court even to purchaser without notice, though this extinguishes lien on any *cargo* not clearly traceable. (7) Marine Insurance, a contract relating to shipping property, will be dealt with in Chapter V.

Property in its subjective sense—*i.e.*, right of ownership—has already been said to involve three chief and exclusive elements : viz., possession, enjoyment, disposition. Each of these, by being separated by owner's express or implied consent or by some rule of law, may give rise to qualified property in some other. Indeed, where ownership is equitable and successive, owner's right of possession may be merely present right to future possession of some specific thing being a chose in possession. Choses in action on the other hand involve no specific thing. Thus the right to recover a sealed bag containing 100 *specific* sovereigns is a right to a chose in possession, whereas right to recover £100 as a *debt* is a chose in action. Strictly speaking, there can be no possession in such rights. But by inventing instruments which evidence the

rights, and devising means of passing them from one to another, Law Merchant and legislation have in effect made them capable of being treated as property, possession here being replaced by holding some document of title to non-specific property in shape of money.

CHAPTER IV.

CHOSES IN ACTION—NEGOTIABILITY.

I. CHOSE in action in its older or stricter sense has, as we saw, two chief meanings corresponding to the two meanings of property: it is (1) subjectively, *right to sue* for determinate or determinable sum of money, or (2) objectively, *amount* recoverable thereby. Chose in action is (a) Legal, when amount is recoverable, now and formerly, as *legal* debt in Court of Law; (b) Equitable, when it is of a kind recoverable formerly only in Court of Chancery, in some cases still only in Ch. D., *e.g.*, property in hands of trustees, or of Court to credit of an action.

One great mark of property was at C. L. entirely wanting to most choses in action, viz., power of disposition or transference *inter vivos*, since "the wisdom of our ancestors" deemed that this would lead to contention, oppression, and subversion of justice.* But custom of Merchants early established one exception in Bills of Exchange, and public policy two others in Annuities (transferable

* Coke. Other reasons have been suggested, but all alike are conjectural.

by deed) and liquidated Debts due *from* the King: all others could be sued for only by the original creditor. It was perhaps hardly before time of Hen. VII. that legal assignment (now called "power of attorney") was allowed by agreement authorizing assignee to sue in name of *assignor*. Later, assignee might sue in his own name, provided debtor had *assented* to transfer. Thus, if A. owed money to B., B. could obtain from C. the present value of the debt by assigning it to C. as security, but only if (1) A. assented, or (2) B. lent his name to C.—a course often inconvenient to both B. and C.

Meanwhile Equity went a step farther by allowing assignee for *value* of *equitable* chose in action to sue in his own name, even *without* debtor's assent.

At the present day equitable assignment may be of *legal* or equitable chose in action; such assignment (1) may be (though it rarely is) merely *verbal*, (2) notice to debtor is not essential to its validity, (3) it is *primâ facie* "subject to equities," *i.e.*, assignee takes subject to *defects* of title (if any) and to all *rights of third parties* existing at date of assignment (*e.g.*, previous charges, set off, &c.). This *primâ facie* presumption gives way under clear evidence of contrary intention, *e.g.*, where very nature of subject-matter implies freedom from equities (*Re Agra Bank*). Assignment without notice to debtor is valid as against assignor and

subsequent assignee without such notice given, but it is postponed to any assignment even subsequent of which debtor has express or constructive notice: Therefore assignee, for safety, should always give notice to debtor at once. Written notice, though not essential, is obviously more prudent. Where chose in action is money in *Court*, notice takes form of "Stop Order": where it is in form of shares or stock, assignee should file *affidavit* and *notice* in C. O., and serve office copy and duplicate notice on company, so that the shares or stock may not be dealt with without his knowledge and opportunity of asserting his claim. Such assignments rank in order of notices (*Dearle* v. *Hall*), stop orders, &c., as case may be.

Legal assignment has now been greatly enlarged by statute law. Various Acts having already made Life and Marine Insurance policies and some other kinds assignable, it was enacted by J. A., s. 25, that every (1) *legal* chose in action, where assignment is (2) *absolute* and not by way of charge only, and (3) made in *writing*, with (4) express written *notice* to debtor, may be sued for by assignee in his own name.

But (a) he takes "subject to equities," (b) if assignment is disputed by assignor or other, debtor may (i.) take out interpleader summons, or (ii.) pay into Court under Trustee Act. Thus assignment of *whole* debt in ordinary form of mortgage with

proviso for reconveyance of surplus to assignor (*Tancred* v. *Delagoa Bay Co.*) or trust for such payment (*Comfort* v. *Betts*) is good legal assignment, while *charge* of lesser amount on whole outstanding fund could at most be mere equitable assignment. Thus there may be (1) *legal* or (2) *equitable* assignment of *legal* chose in action, and (3) *equitable* assignment of *equitable* chose in action. (1) requires writing and written notice; (2) and (3) do not absolutely require either; (1) so far as it is mere assignment (not negotiation) is always, and (2) and (3) are generally "subject to equities." Where a chose in action is future and contingent on personal act of assignor, or reversionary and dependent on his outliving some other person, it is clear that its value to assignee is speculative. Also, we shall see later that some few choses in action are, by public policy, non-assignable.

Choses in action as rights *in personam* may be (1) intended for *speedy extinction* by payment, or (2) to be *kept on foot* for long or indefinite time, just as some choses in possession, *e.g.*, fruit, fish, &c., are evanescent, while land and many chattels are enduring. It is more particularly where money is not intended to be speedily claimed, most of all when interim *interest* is payable, that choses in action are advantageously treated as foundation for rights *in rem*. They are then termed "investments"

for money, and may further amount to "securities." Such have become in fact a most important form of modern personal property.

Thus, A. having money for which he has no immediate use may lend it, with or without security, to B., who pays interest for use of it and can employ it to his own advantage. B. may be a person, partnership, company or State; the investment may be simple loan, or on promissory note, or on bond, or secured by mortgage (bill of sale or not), or company shares, debentures, Consols, or Colonial or Foreign Government bonds. A. too may be either beneficial owner, or be trustee seeking permanent investment with security for trust-money subject to *successive* interests.

On the other hand, advances on bills of exchange or of lading and the like are quite *temporary*, and cannot be called investments. Assignment both of permanent and of temporary choses in action is equally permitted: the latter is not quite free from some of the abuses feared by "the wisdom of our ancestors." Thus it has been found necessary for the Court to rule that purchase of debts whereon to found bankruptcy proceedings for some *collateral purpose*, *e.g.*, gratification of malice against an embarrassed neighbour, should be discouraged by refusing adjudication (*Ex parte Griffin*).

II. Negotiability is assignability and something

more. A negotiable instrument is one assigning chose in action by (1) *delivery* of instrument, or (2) delivery with *indorsement*, so as to pass legal title and right of action in assignee's own name, and so that (a) consideration is *primâ facie* presumed in favour of assignee, and (b) he takes instrument *free from equities*. It must be of kind known to Law Merchant, (i.) by Trade Usage newly and sufficiently proved by evidence, (ii.) judicially recognized as result of previous decisions, or (iii.) established by Statute.

It is thus a minor kind of currency of the country, new forms of which cannot be introduced merely by agreement between particular individuals, though according to the more probable opinion they can be by *general* acceptance on the part of the community. Such are (1) Bills of Exchange, by ancient custom of merchants now confirmed by statute, comprising (a) Foreign Bills (the oldest), (b) Inland Bills, (c) the variety termed Cheques (including Dividend Warrants); (2) Foreign Bonds, scrip, and various other instruments, by modern trade usage; and (3) Promissory Notes (including the variety termed Bank Notes) and various other instruments, by Act of 1704 and other statutes.

Bill of Exchange (or Draft) is *unconditional* order in writing signed by drawer to drawee to pay on *demand* or at determinate or determinable *future* time a sum certain to or to *order* of payee, or to

bearer. If drawn in name of corporation, it *may* be sealed in lieu of signing. Foreign Bills are all that are neither (1) *drawn* and *payable* in Br. Isles, nor (2) *drawn* therein on *resident*, though payable elsewhere. They are (a) usually drawn in two or three *parts*, (b) subject to *usances*, *i.e.*, extra periods of currency according to distance, (c) subject to necessity of *protesting* before notary on "dishonour" by non-acceptance or non-payment, (d) dependent in *construction* on *lex loci* of drawing, acceptance, indorsement and payment respectively. Cheques are Bills drawn on banker payable on demand and not requiring acceptance. They *may* be crossed (1) "generally," *i.e.*, by two cross lines with or without words "& Co.," making them payable by bank of drawing only to some *other* bank; (2) "specially," *i.e.*, with name of particular bank; or (3) may be marked "not negotiable," after which any transferee takes subject to equities, *i.e.*, it is no longer a negotiable instrument. Unless so marked, "holder in due course" (one who holds *bonâ fide* for value without notice of any defect) of cheque or other bill has perfect title, even though his transferor or some previous holder had fraudulently negotiated or stolen it. Nor does crossing cheque generally or specially alter this; it simply interposes intermediate bank so as to increase difficulties of thief and help to trace him.

Promissory Note or (Note of hand) is *unconditional* promise signed by maker, in other respects like bill. Thus in bill, *drawee* is intended (by accepting) to be principal debtor; in note it is *maker*, and first *indorsee* corresponds to drawer. Bank Note is promissory note made by banker payable on demand, and in England can only be of Bank of England or of a small and ever lessening number of *provincial* banks which had right of issuing notes granted to them before Bank Charter Act, 1844. Thus, Bank of England notes are part of ordinary currency, being by Act of Wm. IV. legal tender for all sums above £5, except by Bank itself, which is bound to redeem "paper money" on demand. Hence distinctive letters and numbers on such notes are *material* part of instrument, alteration of which makes it void (*Suffell* v. *Bank of England*). But country notes are *inferior* currency, and like cheques and bills are good tender only by agreement and acceptance by creditor.

Law of Bills and Notes rests partly on Custom, partly on Bills of Exchange Act, 1882, and cases interpreting custom and Act, forming mainly a branch of Law of Contract. As to points bearing specially on Property Law, we see that to make bill complete, there should be both *drawing* and *acceptance* (actual or virtual). Either may precede; when acceptance comes first, this means that, *e.g.*,

A. has signed his name on stamped paper and delivered this inchoate instrument or "skeleton bill" to B. for *purpose* of conversion into complete bill, which B. may do by filling in words of order, name of payee, and amount not exceeding what stamp covers, and may treat A.'s signature as that of drawer, acceptor, or indorser, as he prefers. More usually drawing precedes, and though this must be unconditional, drawee is free to refuse acceptance altogether, or offer "qualified" acceptance; this latter may be of many kinds, of which the most important is "local" qualification, *e.g.*, "Accepted payable at —— Bank and *not elsewhere*." Payment can then be had only at such bank: if no such words as those in italics are added, it can be had at such bank *or* on personal demand from acceptor. But holder is not compelled to take qualified acceptance; he may reject it, treat bill as dishonoured, and sue drawer. Ordinarily drawee either has funds of drawer in his hands or by agreement with him is to have funds in time for payment. But drawer, acceptor, or indorser may be "accommodation party," who without having value for himself signs merely to oblige some other, and thereby becomes equally liable to holder in due course. "Acceptance for honour supra protest" is by stranger to bill who accepts after dishonour, with consent of holder, to save credit of drawer, &c.

Acceptance *per proc.* is by agent who can bind his principal only within limits of authority.

In many cases it is not necessary to present bill for acceptance before time for payment. The three cases where it is necessary are (1) where it is so stipulated on face of bill, (2) where bill is drawn payable so long after sight, demand, presentation, &c., (3) where it is drawn payable elsewhere than at drawee's house or place of business; and even in these cases it may be waived or become impossible.

Indorsement is required when bill (or note) is payable "to order." Indorsed "in blank" by mere signature, it becomes "bearer bill"; by "special" indorsement naming transferee it remains "order bill," payable only to such transferee or his order. "Restrictive" indorsement may be such as to destroy further negotiability, as "Pay D. only," or may pass mere *possession* of bill for specific purpose — *e.g.*, "Pay D. or order for *collection*." Banker paying order bill on demand or cheque, with forged *indorsement* is not liable, though he is liable for paying cheque with *drawer's* name forged. Nor is he liable for paying without negligence cheque on which crossing is non-apparent or obliterated.

The value of bill or cheque during its currency obviously depends on personal credit of names on it, as necessity of its being *unconditional* order prevents it from being secured on any specific fund or

property. The persons liable to holder are first acceptor as principal debtor, then drawer and all indorsers as quasi-sureties. Here we may note two points. If holder for value take order bill without proper indorsement, he is not holder in due course, and takes only subject to equities, but as between him and transferor has right to demand indorsement. On the other hand, if he takes bearer bill without indorsement, transferor is not liable *as party*, though he may be for express or implied misrepresentation as to validity of bill or cheque. And if he chooses to indorse bearer bill, he thereby becomes party to it and liable as such.

As a particular example of one form of bill, suppose A. B. at Singapore wishes to transmit £100 to C. D. in London, where A. B. has no agent, he may request his bankers to draw on, *e.g.*, Bank of England, as thus :—

" Chartered Bank of ——

004563 19/57/ Singapore, July 2, 1899.

(Stamp) To the Cashiers of the Bank of England

On Demand pay this First of Exchange (second not paid) to the order of C. D.

One Hundred Pounds only Sterling, for value received.

For the Chartered Bank of ——

(£100 0 0) E. F., Acct^{t}."

Such bill requires no presentation for acceptance; if, however, instead of being payable "on demand" it were, *e.g.*, "Three months after date," or "sight," &c., three months and further three *Days of Grace* would have to pass after date or presentation before money would be payable, in addition to period of usance, if provided for. Bills and cheques are *temporary*, and should be promptly presented for payment; a bill not on demand on very day it is due (*i.e.*, face date and days of grace, &c.); bill on demand or cheque "within *reasonable* time after issue": otherwise drawer and indorsers are discharged. Bills are discharged by "*payment* in due course," express *waiver* in writing, intentional *cancellation*, and unauthorized *material alteration—e.g.*, of date, sum, time, or place of payment, &c. A cheque may not be paid by banker after (1) *countermand* by drawer, or (2) notice of his *death*. Bank of England notes rarely remain long current (on the average, it is said, less than a fortnight), and are never reissued after returning to the Bank. Promissory notes payable at *fixed* date are subject to same rules as to prompt presentation for payment as are bills; so, too, are those payable on demand after being once *negotiated*. Generally, notice of dishonour by non-acceptance or non-payment must be given with all reasonable promptness to drawer and all other parties whom it is intended to charge.

On the other hand, a note payable on demand and expressed to bear interest may be and often is not *intended* for negotiation, though of course capable of it. Such may be treated as permanent investment for money, which is then often said to be invested on "personal security." Payee at any time may without giving notice (as mortgagee must) demand payment and bring action. But if interest is regularly paid and payee is satisfied of maker's solvency, such investment may last for years, and on maker's death is recoverable against his estate. Such note may be several, joint, or joint and several. As an instance of the last, it may run—

"London, June 1st, 1899.

(Stamp) On Demand we jointly and severally promise to pay to or to order of G. H. the sum of One Thousand Pounds [for Value received] with interest thereon in the meantime at the rate of £5 p. c. p. a.

A. B.
C. D.
(£1000 0 0) E. F."

Here the words in square brackets, though often added, are quite unnecessary, consideration being presumed. The form of promise is unconditional, but there may be a tacit though not legally enforceable understanding that demand will not be made

without reasonable notice, nor negotiation attempted except on default of interest.

Bills, cheques, and notes (other than Bank Notes) are regulated by Act of 1882, and can only be in the form and subject to the provisions therein contained. Among instruments negotiable by modern *usage* are Colonial and Foreign Bonds to bearer recognized on Stock Exchange, &c., as transferable by delivery and habitually treated as free from equities (*Gorgier* v. *Mieville*); also Scrip Certificates on which all instalments have been paid and no name yet filled in (*Goodwin* v. *Robarts*). These last are evidence of right to allotment to bearer, which may be of (1) Colonial or Foreign *Bonds*, (2) *Shares* in Banking or Railway Companies, or (3) Debenture *Stock*. Debentures to bearer will be considered presently.

A Bill of Lading is sometimes spoken of as "negotiable"; it differs, however, in two important respects. In hands of consignee or his indorsee for value, it gives (1) right *in rem* as document of title to specific goods, thus operating as conveyance of choses in possession; (2) right *in personam* enabling him to sue on contract of carriage as expressed in bill, but *subject to equities;* hence stolen bill of lading is worthless, even when it gets into hands of *bonâ fide* holder for value without notice of theft or any other defect. Thus it is correctly

described as "transferable" or "assignable," but not "negotiable," subjection to all liabilities affecting indorser being by Act of 1855 expressly attached to indorsee. As it *represents* specific goods and also gives right of contractual action, it may be said to stand on border-line between choses in possession and in action. Hence follow two curious results. (1) Indorsement to *bonâ fide* holder for value without notice of transferor's insolvency destroys unpaid vendor's right of stoppage *in transitu* (*Lickbarrow* v. *Mason*, and S. G. A.). (2) If two parts are by fraud or mistake indorsed to two indorsees, first indorsement passes *property* in goods (*Sanders* v. *Maclean*), but the second indorsed part if first presented authorizes shipmaster or wharfinger to deliver *possesion* of goods (*Glyn Mills, &c.* v. *E. and W. India Docks Co.*). Thus, if A. sells and sends goods by ship to B. at X., and then hearing of B.'s insolvency telegraphs to X. to stop delivery, and B. has meanwhile indorsed part 1 of bill of lading to C., aud afterwards part 2 to D., both for value, and D. has presented part 2 before C. presents part 1; then shipmaster is bound to deliver to D., and cannot be sued by C., the real owner, whose remedy is against D., while A. has lost all claim to goods and has only personal remedy against B. Instead of being absolute, indorsement and delivery may be qualified by way of pledge for advance; right of

stoppage *in transitu* is not then destroyed, but vendor can redeem goods only by paying off amount advanced by pledgee to consignee (*Kemp* v. *Falk*). Factor's Act extends these rules to transfer by dock warrants, &c., when they amount to documents of title.

We thus see that transfer by delivery and indorsement is not conclusive that instrument is truly negotiable. The test of negotiable instruments has been said to be, "Can a thief give good title to *bonâ fide* transferee?" It is to interest of bankers, brokers, and business men as such that as many instruments of title as possible should be negotiable. It is to the interest of many other persons that documents of title such as are employed in *permanent investment* should not be negotiable, lest some dishonest person by owner's carelessness or accident obtaining possession should pass title to *bonâ fide* transferee. As result of this conflict of interests Law has till lately been unsettled. It may be summarized thus:—

(1) A negotiable instrument is one which by assignment gives transferee (a) legal right to sue in his *own name*, (b) *primâ facie* presumption of consideration, and (c) legal title to chose in action *free from equities*. It is not uncommon, but is incorrect, to term instruments negotiable which have note (a) without notes (b) or (c); such are really assignable, not negotiable.

(2) Such words as "to bearer, order, holder, &c.," *primâ facie* import that instrument is *intended* to be negotiable, and may be or become so in fact by general usage.

(3) On bills of exchange by *ancient* General Custom of Merchants, and on promissory notes by St. of Anne, such words conclusively import negotiability.

(4) Foreign bonds, foreign and English scrip, &c., which (a) on face by such or similar words extend right of suing *beyond particular individual,* and (b) are proved by present English Usage of Trade to pass accustomably by delivery or delivery with indorsement, and to be treated as conferring *freedom from equities,* are truly negotiable.

(5) English instruments *under seal* of a corporation may be (i.) unconditional promissory notes, seal being used in lieu of signing (under Act of 1882), and are then negotiable; or may be (ii.) conditional, as debenture to bearer, &c., and therefore outside Act of 1882. As to these last, it was formerly held, in *Crouch* v. *Crédit Foncier,* that *ancient* Custom was essential, and that no *English* instrument under seal could become negotiable by modern usage. This decision was often doubted, and it may be taken as now settled by *Bechuanaland Exploration Co.* v. *London Trading Bank* that such English debentures to bearer under seal may become negotiable by modern usage.

(6) What is nature of instrument, and whether transferee is *bonâ fide* holder without notice, are questions generally of mixed fact and law, especially as to *presumption* of notice arising by occupation, previous dealing, &c., of transferor (*v. Sheffield* v. *London Joint Stock Bank, London Joint Stock Bank* v. *Simmons*). At the same time mere *negligence* (without more) of transferee does not of itself prevent him from being *bonâ fide* holder (B. E. Act, and *v. Venables* v. *Baring & Co.*).

(7) Bills of Lading, Dock Warrants, and the like, are not negotiable.

(8) An instrument purporting negotiability on face, but not truly negotiable, *e.g.*, for want of proof of general usage, being delivered by owner to agent to use *as negotiable* for owner's own limited purpose only, if agent in fraud of owner negotiate it, owner is estopped by his own conduct from denying negotiability as against him in hands of *bonâ fide* holder for value without notice (*Goodwin* v. *Robarts*). This is quasi-negotiability, or "negotiability by estoppel."

It is evident that this principle of negotiability by estoppel will cover many otherwise doubtful cases. It applies, as above, between original owner and transferee from owner's agent; also, it applies as between original debtor and *bonâ fide* holder for value, where such debtor has undertaken

to pay holder be he who he may (*Webb* v. *Herne Bay Commissioners*). But estoppel cannot affect rights and liabilities of third parties. Thus, if A. issues to B. an instrument not strictly negotiable at law but purporting negotiability on its face, and engages so to treat it; B. assigns to C., D. steals it from C., and assigns to E., who takes *bonâ fide* for value: A. is estopped in turn from denying title of B., C., D., E., so long as each is holder and A. ignorant of the theft. But E.'s title is vitiated by theft from C.; hence (a) if A. has paid E., C. can recover from E., (b) if C. has given notice of theft to A. before payment to E., A. must refuse to pay E. Had the instrument been bill, note, or other negotiable instrument, E.'s title would have been perfect, and results (a) and (b) would not have followed. Thus private arrangement or acts and conduct of person or corporation may bring about negotiability by estoppel, but not true negotiability.

Promissory notes payable on demand and the like, though often termed "personal securities," are obviously no true security, as they form no charge on any *specific* property, but are convenient as embodying complete contract, and thus facilitating action, if necessary. Bonds or other such instruments under seal are a higher kind of "personal security." Now that a bond has lost priority in Administration since 1869, its chief advantages

are that (1) in itself it produces estoppel, (2) it is (if neither illegal nor fraudulent) valid without consideration, (3) it may be sued on within twenty years after date, payment on account, or written acknowledgment.

An I. O. U. is not a contract in itself, but merely *primâ facie* evidence of debt. As such it requires no stamp, if it does not go beyond form such as, *e.g.*, "May 10, 1899. A. B. I. O. U. £50. (Signed) C. D." If beyond this it unconditionally promises payment, it must be stamped as a promissory note —viz., with 1*d.* stamp up to £5; *ad valorem*, if above; if it contains terms and conditions, it requires a 6*d.* stamp as an agreement, before it can be tendered in evidence.

Various State issues are made negotiable by statutes other than Act of 1882. Such are Exchequer Bills and Bonds, Treasury Bills, India Bills, &c. Consol certificates by National Debt Act, 1887, are transferable by *delivery* alone, until name of intended Consol holder has been filled in. Postal Orders and Post Office Orders are not negotiable; transferee takes subject to equities. Exchequer and Treasury Bills are somewhat similar to ordinary bills of exchange; the former are the means by which Government obtains advances from bankers for everyday public expenditure; the latter are often used for raising extraordinary sums on special

occasions. In both cases, in lieu of a date for payment off on face of instrument, time for repayment may be fixed by Government itself and advertised. Exchequer bonds are purely negotiable, Exchequer and Treasury bills are so only while certain blanks remain unfilled; being State issues, all three are only *quasi*-choses in action.*

* *v.*, p. 61.

CHAPTER V.

ANNUITIES—INSURANCE—DEBENTURES.

THESE three forms agree with the instruments already considered in being choses in action of class i. in the strict or older sense, *i.e.*, of determinate legal value.

I. Annuity is periodic payment by person, persons, or corporation to another or his representatives. It is not, like rent-charge, payable out of land, nor is it of necessity charged on any specific property. It may be by grant or bequest to A. for years, life, lives, or for ever, or to A., his executors and administrators. If exceeding a life interest, it vests on A.'s death in his representative as part of his personal estate. If limited to "A. and his heirs," it is still not a hereditament, and though on intestacy vesting beneficially by force of the limitation in his heir, it would pass by will under general bequest of personalty. Nor, if limited "to A. and heirs of his body," is it a tenement within *De Donis*, but rather analogous to old "fee simple conditional at C. L.," alienable by A. if he has or has once had issue, or by his surviving issue. Ordinary cases of annuity

are (1) gift by will, generally for life, *e.g.*, to old servants; (2) as consideration for loan, often where borrower has no better security to offer, and then frequently combined with life insurance; (3) as means of increasing income by sinking capital in Government or other life annuity. Annuities are generally capable of legal or equitable assignment or charge: a few are not, either (a) by Public Policy of C. L., *e.g.*, half-pay or other payment in nature of retainer for possible future services or otherwise for purposes tending to public benefit, or (b) by St., *e.g.*, salary of English judge, military and naval pay, pensions to officers and their widows. Pension of ex-Colonial judge may be assignable in Equity, if not at Law (*Re Huggins*).

The Public Funds chiefly consist of Government Annuities; the earliest were granted to annuitants and their *heirs* on *personal* credit of King and his Ministers, but the obligation was afterwards adopted by Parliament as representing the Nation. By a series of National Debt Acts they now devolve as ordinary personalty, and are under management of Bank of England as agent for Nation and Government. Many species of such securities have at various dates been reduced to *perpetual* annuities; hence the name "Consols," *i.e.*, consolidated annuities formed into Stock, and thus capable of transference in large or small amounts. The right

of stock-holder for time being is to receive periodic (half-yearly or quarterly) payments, subject to right of Government, by obtaining Act, to redeem at fixed value, or "convert" into other stock paying lower interest or otherwise different. Public stock stands in name of person (or not more than four persons) having *legal* title, and is transferred by signing books at Bank of England in person or by attorney authorized under seal. Equitable interest may be assigned without reference to books, as no trusts appear in them. Money in Consols notionally converted by trust or direction to purchase and settle land in tail cannot be paid out without disentailing assurance. Money in Court representing entailed land, *e.g.*, on payment in under Land Clauses Act, if it exceeds £200, usually requires similar disentail for payment out.

Registered Foreign and Colonial Stocks held and payable in this country are very similar. Forms of transfer vary; they generally resemble those for transfer of company shares and stock.*

Similar also to some extent are County Council and Municipal Stocks issued by public bodies which under various Acts are empowered to borrow at interest. Thus (1) under Local Loans Act, 1875, various rating authorities may issue "terminable debentures" (generally £20 or more, and redeemable

* *v.*, p. 94.

in 20 years), debenture stock and annuity certificates; (2) under Municipal Corporations Act, 1882, loans for purchase of lands or erection of buildings may be raised on security of corporation lands or rates, generally redeemable in 30 years by sinking fund; (3) under Local Government Act, 1888, borrowing powers under (1) above are as regards Counties transferred to County Councils. Many other loans are raised by bonds, debentures, or debenture stock under private or local Acts. Such stock is, within certain restrictions, a "trust security" under Trustee Act, 1893.

It may seem at first sight as if there was little difference, except in details, between British, Colonial, or Foreign Government Stock and "Local Government" Stock. But there is an important difference of principle. The holder has no certain right of action against any supreme Government, British or Foreign, and *semble* Colonial, even this last standing *in this respect* on footing of a supreme Government. For from very notion of supremacy, to which nothing is *ultra vires*, any supreme or quasi-supreme nation as debtor may, by passing a law, prospective or retrospective, lower or extinguish interest, and diminish or repudiate principal, and against such law no action or petition of right can avail the creditor.* Legal rights,

* See note at end of chapter.

it is true, do exist (1) as against Bank of England acting as agent and responsible by statute, (2) as between transferor and transferee. Hence such property is termed a "*quasi*-chose in action," since all ordinary rights of action exist except by holder against borrower—*i.e.*, the supreme Government representing the Nation. But holder of County Council or Municipal Stock has to do with a corporation or body of persons having much more strictly limited powers; here the debtor-corporation cannot of itself repudiate or alter contract with holder without his consent: such property is therefore a true legal chose in action. County Council or Municipality is herein a mere delegate of Imperial Parliament, while even a Colonial Government is much more than this, "restricted in the area of its powers, but within that area unrestricted" (*Powell* v. *Apollo Candle Company*).

II. Insurance consists in contract of "Assurance" embodied in "Policy of Insurance," setting up right of insured to receive from insurer a sum determinate or determinable, either as *indemnity* against contingent loss, or payable on future event of *uncertain* date. Usual forms are (1) Marine, (2) Fire, (3) Life, (4) Accident, (5) Guarantee Insurance. Under (1) loss may be of ship, goods, freight, expected profits, bottomry interest, &c. Under (2) loss may be by injury to building, movables, crops, or by

liability to rent after destruction of building leased. (3) has an important subdivision into (a) insurance on life of another (*sur autre vie*), and (b) abnormal form on life of insured himself. Both depend on event of uncertain date, for *Nihil certius morte, nihil incertius horâ mortis.* (4) is a very modern form, and may be against all accidents, or only some particular form—*e.g.*, railway accidents, burglary, &c.; again, it may be against bodily accidents to insured, or accidents to others for whom he is responsible—*e.g.*, employer for his employees; hence this branch has been stimulated by Employers' Liability and Workmen's Compensation Acts. (5) is merely ordinary guarantee or suretyship against debt or default of another when undertaken by some company or body of men who likewise carry on insurance business proper. It therefore properly falls under Law of Contract, not of Property.

The contract out of which these rights of property arise calls for some remarks. (1) This contract is "aleatory," but not merely "wagering"—*i.e.*, it involves risk on both sides, but on one side at least this risk is *antecedent* and *independent*, not merely created by the contract. Thus, if A. bets with B. for or against C.'s horse winning a race, the whole risk of loss to either A. or B. springs out of the bet itself; equally so in general, if he bets with B. against B.'s own horse. But if A. insures his ship

or house with B. office, risk to A.'s property existed before insurance, and he *contracts* in order to recoup himself wholly or partially in case of actual loss. Without insuring, A. stands to lose nothing in one event, or lose whole or part value of ship or house in the other. After insuring, he loses premium or premiums in any case, but in event of wreck or fire covers his loss to extent of insurance *minus* premiums. B., the insurer, had no previous interest in A.'s ship or house; by the contract the office may be fairly said to *bet* against wreck or fire, staking risk of paying out large sum in future against previous receipt of premiums. So in Life Insurance; office in fact bets against speedy death of insured, or more exactly wagers that average of insured lives will last long enough for receipt of profitable number of premiums. Thus insurance has a wagering side, but only as secondary and subsidiary to primary intention of protecting some property right or interest conceived of as analogous thereto.

2. Hence follows statutory rule, under Acts of 1745 and 1774, requiring every person effecting insurance to have "insurable interest" in subject matter, his name to be inserted in policy—*c.g.*, insured may be owner, part owner, mortgagee, &c., of ship or building, but must not be total stranger to it. As to Life insurance on life of *assured*, every man by peculiar fiction is deemed to have unlimited

pecuniary interest in *his own life*. This in practice means that he may create a posthumous fund to as large an extent as he can induce insurers to undertake, to be raised after his own death for benefit of his chosen beneficiaries, or (as is now sometimes provided) payable in alternative after certain date at agreed then present value to himself in his lifetime. The insurable interest in Marine policy may be at any time before loss; in Fire policy it must exist both at date of policy and of loss; in Life policy it is enough that it exists at date of policy. In Accident policy against accident to another, *semble* it need only exist at date of accident.

3. It follows that contract of insurance is in inception always either contract of *indemnity* or (when on life of insured) treated as analogous thereto. But Life insurance, *sur autre vie*, once created, remains no longer contract of pure indemnity for loss to property; if pecuniary interest ceases, policy may still be kept up. Thus, if A. insure life of his debtor B., and B. in his lifetime pays off debt, A. may still go on paying premiums, and at B.'s death receive whole amount insured (*Dalby* v. *India, &c. Life Assurance Co.*). And though Accident insurance policies obviously rest on notion of indemnity, to avoid dispute as to amount of actual loss, they are now generally expressed to be for payment of (a) lump sum, or

(b) weekly allowance of fixed amount in case of total or partial disablement by accident. In all other insurance amount due is limited to actual damage accruing to insured.

4. Insurance proper of every kind is contract *uberrimæ fidei*, and avoided not only by active misrepresentation, but by passive omission to state any *material* fact known to applicant. So-called guarantee insurance, however, is in its inception ordinarily avoided only by *fraudulent* representation or omission, but once formed is avoided by any non-communication of change affecting risk of guarantors. And even guarantee may under special circumstances be from the beginning *uberrimæ fidei* (per Romer, L. J., in *Seaton* v. *Heath*). An answer to material question, if *bonâ fide* but erroneous in fact, avoids a Marine or Fire policy; in case of Life policy it appears that it does not, unless the contract was expressly framed as dependent on the truth of such answer.

5. Miscellaneous points. In Marine insurance, policy may be (a) Valued, agreed value being inserted therein, or (b) Open, leaving value to be declared on arrival of ship. Again, it may be (i.) Voyage policy against loss between port and port, or (ii.) Time policy, limited to fixed period. In (ii.) there are three implied warranties (really conditions) —viz., Seaworthiness at commencement of risk,

Non-deviation from course (often expressly waived), and Reasonable diligence in guarding against risks. In (ii.) the first "warranty" is not implied, because such insurance is generally made when ship is abroad, and its condition at the moment therefore not certainly known (*Dudgeon* v. *Pembroke*). Another variety consists in a kind of combination of (b) and (i.) by insuring *cargo* to be carried by any ship or ships between two or more named ports up to some large fixed amount, and as each cargo arrives, declaring and writing off its alleged value from total of insurance money: this and (b) in general are apt to lead to disputes and charges of fraud.

Marine insurance is generally undertaken by a large number of persons, since thus "loss lighteth rather easily on many than heavily upon a few." These "underwriters" may form an Insurance Company (the two oldest being chartered companies), or very frequently are *individual* members of Lloyd's, which is itself a company incorporated by special Act of 1871. Risk of loss to insurers may now be further lessened by *reinsuring* underwriters' interest in ship or other thing insured. Loss may be "total," either *per se*—*e.g.*, by sinking in mid-ocean, or constructively by abandonment; in latter case insurers by subrogation step into shoes of insured, property in vessel, &c. (if recovered), vests in them, with all incidental rights, as freight,

&c., and any rights of action. "Partial" loss on the other hand must be estimated before payment.

Under Fire policy, by Act of 1774, any person "interested in or entitled to" buildings destroyed or damaged may procure insurance money to be laid out in rebuilding or repairing; this provision holds throughout *England*, and is not confined to places within "Bills of Mortality" or elsewhere expressly named in preamble (*Ex parte Goreley*). Hence lessee's covenant to insure appears to "run with land" within first resolution in *Spencer's Case*.

In Life Insurance, insurable interest in life of another may be illustrated by noting that a man actually supported by father or any other person has such interest in his life, creditor has in debtor, manager in actor, &c. Parent may have such interest in child (a) if receiving income for maintenance or otherwise terminable on child's death, or (b) up to £6 under Friendly Societies Act, 1896, as provision for burial, &c., expenses, no contract under (b) being assignable. A married woman, under M. W. P. A., may insure her own or husband's life for her separate use: either husband or wife may insure for benefit of other and children by policy so expressed, moneys vesting in trustee (if named) or personal representative; creditors, on proof of fraud, are entitled to receive *amount of premiums* out of such insurance money. Any life policy becomes void if the life is

terminated by sentence of Law or by *felonious* suicide; it is also avoided by suicide during insanity, if it contain express condition of avoidance on "suicide."

Assignment of insurance, whether legal or equitable, and made by indorsement or by separate instrument, is principally of Marine and Life policies; when legal, under Acts of 1868 and 1867 respectively, either absolute or by way of mortgage; notice of assignment of *Life* policy must be given to office, priority of two or more assignments depends on dates of *notice*. Such legal assignments may also be made by following rules of J. A., s. 25. No assignment of Fire policy, Guarantee policy, and *semble* Accident policy, is valid without *assent* of office. Without such assent, it follows that, if A. insures his house, and then sells it to B., and before delivery of possession house is burned down, neither A. nor B. can recover; A. because he has received or is entitled to value of house from B., and therefore sustains no loss; B., because he is neither party to nor assignee of contract (*Castellain* v. *Preston*).

From Conveyancing point of view, Life insurance is the most important form. Property bequeathed to wife and children often consists largely of insurance moneys. During his life the insured may treat policy as a valuable asset, charging or mortgaging

it for his own purposes. Marine insurance is the oldest, and the statutory form preserves curiosities of ancient language; it runs somewhat thus:—

"Be it known that A. as well in his own name as for all to whom same doth appertain doth make assurance and cause him and them to be insured ["lost or not lost," if ship at sea or abroad] from Southampton to Calcutta upon goods body tackle &c. of and in the good ship *Mary Jane* whof is master under God for this voyage B. or whoever else shall go, beginning adventure from ("loading and shall so continue upon ship until arrived at Calcutta and moored 24 hrs and upon goods till landed," if voyage policy; "July 23rd next for three calendar months," if time policy). [Ship and goods valued at £——]. Touching adventures and perils to be borne by assers they are of seas men of war fire thieves jettisons barratry restraint of princes &c. In case of loss or misfortune it shall be lawful for assed servants &c. and assigns to sue labour and travel for recovy of ship goods &c. without prejudice to this assurance, to wh chges assers will contribute accg to rate hrin assed. Policy to be of as much force as surest poly made in *Lombard Street* &c. We assers hby promise each for his own pt hrs exors and goods to assed exors &c. for true

pformance of prems, confessg pd to us conson at rate of ——

In Witness whof names and sums

N.B. Corn &c. warred free from average unless general or ship stranded; sugar &c. warred under £5 p.c.; other goods ship freight . . . under £3 p.c."

Stamp (3*d.* per £100).

"Barratry" is here any criminal or fraudulent act of master or men leading to loss of or damage to ship or other thing insured. "Restraint of princes" does not include act of British Government in arresting or delaying ship. "Free from average" means that insurers will not (in general) pay for partial injury to corn or other goods so specified.

A note of intended policy called the "slip" is usually previously initialled by underwriter. It is not in itself a valid contract, which by St. must be by regular policy, but may be used as evidence of intention, to explain ambiguities in policy itself.

III. Debentures are a modern form of chose in action, by which a *Company* promises to all members of floating class of *debenture-holders* for time being payment of inscribed sum at fixed date or on some event, with interim interest. It was formerly sometimes (1) a mere promissory note signed by agent,

or (2) bond under company seal, but is now perhaps always (3) a floating mortgage security on specific property for time being—*e.g.*, rolling stock of railway, or generally on whole "undertaking." Its validity depends on borrowing powers (a) implied by non-restrictive Charter or by nature of business, or (b) expressed in "Memorandum of Association," Charter, or special Act. It is generally security for loan from many lenders, but particular debentures may be issued in consideration of services done to Company by one or two persons.

It is usual on first issue not to exhaust borrowing power. Thus there may be several issues, *e.g.*, First 1887 Debentures of £50 each, 1897 A. Debentures of £50, 1897 B. Debentures of £100, ranking according to dates of issue. Any whole issue may be consolidated into "Debenture Stock"; or original issue may be of stock, generally allotted in *minimum* blocks of £50, £100, &c, afterwards transferable in smaller amounts. Railway Debenture Stock under certain conditions is a "trust security." By Act of 1871, where will or settlement allows investment in Company mortgages or bonds, this includes Debenture Stock. In "Terminable Debentures" there is provision for repayment at fixed date or dates; ordinary trading (not Railway) companies frequently thus reserve right to redeem after fixed date, often by periodic drawings.

"Perpetual Debentures" are to be repaid only on default of interest or on Winding up. It will be noticed that such security is a "Floating Charge" on *future* as well as present property. Charge may appear on face, or on separate trust-deed, although in neither case is such mortgage of chattels a Bill of Sale requiring registration under Acts of 1879 and 1882 (Act of 1882 and *Re Standard Manufacturing Co.*), Company being bound to keep its own register of all such mortgages. Yet under Co. A., 1900, any debenture or similar floating charge not filed within 21 days with Registrar of Companies will be void against liquidator and Creditors of Co. If charge includes foreign land of English company, Equity acting *in personam* will enforce equities as between holders and others, subject to prior rights (if any) by *lex sitûs*. Equity will also prevent subsequent issues from having priority over or equality with older ones expressed as "First, Second, &c., floating charge."

Debentures may be (1) to *bearer* with or without option of registration, (2) *registered* simply, or (3) registered with *coupons* to bearer. Thus (1) is more convenient for Stock Exchange purposes, (2) safest for trust or other investments. We have seen that (1) is negotiable, if generally so accepted, or (even if not so) may be "negotiable by estoppel." On default of interest, holder may sue for self and

others for appointment of *receiver* or manager, for *sale*, or (if sale impossible) for *foreclosure:* where there is trust-deed, trustee for debenture-holders may enter, appoint receiver, or sell under power of sale given by C. A. to all mortgagees by deed. Debentures, under Local Loans Act, 1875, may be payable "to A. or bearer"; or "to A., his executors," &c. ("Nominal" debentures) transferable only by *deed* followed by *registration*.

Foreign and Colonial Government Bonds and Scrip are in form similar to debentures. Being, however, only *quasi*-choses in action, they (at least Foreign bonds) give holder no right of action against such Government or its agent in England (*Twycross* v. *Dreyfus*), except so far as it may *voluntarily* submit to jurisdiction. But they give *legal* rights as between transferee, transferor, and all others except issuing Government.

Debentures to bearer with annual drawings may be thus outlined :—

"X Co. Limed (Incorped under Co. Acts, 1862 to 1898). Capital, £200,000 in 20,000 shares of £10 each. Bankers, A. & B., Lombard Street. Office, 175, Blank Street, E.C.

Issue of 1,000 terminable debures of £20 each, intt at 4½ p. c. p. a., secured as First Floating Charge on [the undertaking, &c.].

X Co. Limed (hinafter called "the Co.") will on —— day of ——, or such earlier day as principal hby secured becomes payable under indorsed condons, pay bearer sum of £——, and meantime intt at afsd rate by equal half-yrly paymts on March 1 and Sept. 1 in each year on preson of annexed coupons, 1st paymt Sept. 1 next.

This debure is subjt to condons inded hron (or "in trust-deed dated," &c.).

Given under common seal of Co. April 27, 1899.

Seal affixed in presence of (L. S.)

C. D.

E. F. Dirors.

Inded condons:—(1) numbers 1—1000. (2) 100 redeemable by Co. on March 1, 1904, and each succeeding March 1. (3) Numbers to be redeemed settled by drawings 21—42 days before each March 1 respy. (4) Principal repayable on each sucg March 1. (5) Notices of date for drawg and nos drawn to be advertised. (6) Co. not bound to inquire into title of bearer of debure or coupons. (7) On 3 months' default of intt bearer may by written notice call in principal, wh shall be payable thron, or on windg up by order of Court or sp resolon of Co."

By Forged Transfers Act, 1891, any Company, Local Authority, Benefit Society, &c., also any Colonial Government adopting the Act, *may* com-

pensate by payment out of their funds any *bonâ fide* registered transferee under forged transfer of shares, *debentures*, or stock. This Act has been adopted by the principal Railway Companies.

Note to p. 61. It might seem that the *Bankers' Case*, 14 St. Tr. 1, is at variance with what has been said concerning the imperfection of Consol-holder's title, since it was there held by Lower Court that petition of right would lie, and by House of Lords that relief was available by petition to Exchequer. But (1) the loan there was not to the State-government as such, but to the Crown being one constituent member thereof, and without authority of Parliament; (2) even so, Parliament later interfered, and while adopting in part repudiated half the debt (12 & 13 Wm. III. c. 12, &c.), thus showing that strength of holder's claim consisted ultimately in nothing more than personal credit of debtor—*i.e.*, Nation.

CHAPTER VI.

PARTNERSHIP AND COMPANY SHARES.

We now arrive at the second class of choses in action—viz., those the value of which is indeterminate or indefinite and speculative, of which a share in partnership or company is the most typical example. Any value put on it at its creation or transfer, as £1, £100, &c., is merely nominal, generally (not necessarily) showing sum originally given by owner or predecessor in title, but by no means showing that any owner has, or perhaps will ever have, legal right to that sum, or indeed to any sum at all. His share is "what will ultimately come to him when accounts are ascertained . . . assets got in, debts paid, and amounts realized" (*Ashworth* v. *Munn*). He shares, in fact, in a speculation or "adventure," the result of which to each sharer may be much more than he put in, or again may be less, or zero, or a *minus* quantity. Therefore shares, though *investments*, are not *securities*. Not giving right of action for determinate sum, it used to be doubted whether they were choses in action at all, but as sharer has legal right to have

value (if any) of his property determined, it is now settled that they are (*Colonial Bank* v. *Whinney*). Nor are they mere quasi-choses in action, since owner has legal rights against co-partners or co-members of company.

I. Partnership (for our purpose) is unincorporated association of definite number of persons who agree to combine in *joint undertaking* for purpose of *sharing net profits—i.e.*, excess of returns over outlay. The use of word "company" in its title does not *per se* preclude its being an ordinary partnership; "Smith & Co." may be merely trade name of an unincorporated partnership (or even individual). The combination may comprise property, labour, skill, any or all of them; it usually involves community in capital, profit, loss, and management. Quasi-partnership, *i.e.*, as regards third parties, relates only to non-partners who render themselves liable by (1) sharing profits under certain circumstances, or (2) holding themselves out as ostensibly partners, and so inducing third persons to act on such supposition. Details of this belonging to Law of Contract are unnecessary in consideration of shares as property. Rights and liabilities of partners proper depend, subject to agreement, on Partnership Act, 1890, and other rules established by case-law.

Shares are created by agreement, implied or expressed in "Articles of Partnership," to hold

capital and assets in fixed proportion. If no special agreement, each partner has right to be credited with *capital* brought in by him, to indemnity for *personal expenses* on firm's behalf, and (subject thereto) shares are presumed equal. For this each partner has equitable (non-possessory) lien (1) on firm property for firm debts, and (2) on any surplus assets for obtaining his share, such lien becoming effective on winding up or action. Devolution of shares was considered in Chapter I.

Transfer to stranger without express leave of all other partners by original or subsequent agreement is ground for dissolution. It does not make assignee or mortgagee partner or enable him to interfere or inspect, but gives him right on settlement of partnership accounts to payment of any sum which would be otherwise due to assignor. Transfer to one or more co-partners must equally be by leave of all; if for *value* and firm is *insolvent*, it is fraud on firm creditors, impeachable by trustee in bankruptcy. Shares cannot be *forfeited* or partner *expelled*, except in strict accordance with Articles or other express agreement of all partners.

Question of shares as property arises most frequently on death or bankruptcy of partner, or dissolution of firm by efflux of term, consent, proviso in Articles, or decree of Ch. D. Usual clauses in Articles bearing on subject of property are

substantially as follows:—(1) *Capital*, £——, of which £—— brought in by A., £—— by B., &c., not to be reduced without consent of all; (2) Rent of business premises, rates, taxes, repairs, insurance, and other business costs, *expenses*, and losses to be borne rateably in proportion to capital shares brought in respectively; (3) *Profits* to be similarly divided; (4) Proper *accounts* to be kept of receipts, expenditure, debts, and business matters; (5) On — day of — in each year during term, *general account* and valuation, balanced by accountant, copies signed by each partner; (6) Immediate division thereafter of net profits; (7) Within months after end of term general *final* account of assets, liabilities, book debts to be got in, stock in trade sold, all partnership moneys applied in (a) costs of winding up, (b) payment of firm liabilities, (c) repaying capital, (d) surplus rateably divided between partners and representatives of any deceased partners.

II. Company in widest sense includes any partnership where (1) partners are *numerous*, (2) shares are more or less *freely transferable*, (3) conduct is *regulated* by State. This includes many unincorporated bodies, as (a) Cost-book Mining Companies in Cornwall and part of Devon regulated by Stannaries Act, 1869, but now under County Court jurisdiction; (b) Banking Companies formed before 1844 and regulated by Act of 1826; (c) some formed

under Private Acts. All these, though unincorporated, have right of suing and being sued in name of Public Officer of company; a few are further "privileged" by charter from Crown under Act of 1837. But most modern companies are *incorporated,* forming each a *legal person* suing and suable in corporate capacity. Incorporation of "Jointstock" company is (i.) by Charter, (ii.) by Private or other Statute, or (iii.) by registration under Co. Act, 1862. Under (i.) are chartered companies, associations, and societies, often not for gain—*e.g.*, Royal Society, Zoological Society, membership in which is sought rather for intellectual or social reasons than for share it gives in Society's property. Some chartered companies combine *governing* powers with pursuit of gain in uncivilized countries; some of these fall both under (i.) and (ii.) or (i.) and (iii.)—*e.g.*, "British South Africa Co.," and till lately "Royal Niger Co. Chartered and Limited." Such charter is conferred by Prerogative, apart from legislation. Under (ii.) fall numerous Railway, Tramway, Gas, Water Companies, &c. Under (iii.) are the great majority of existing trading companies.

A huge body of Law has grown up around Companies Acts, 1862—1898: we shall try to note only chief points bearing on shares as property, which they are for purposes of bankruptcy, Stamp

Acts, &c. First, such shares must be in a *legal* company, and any number of persons associated for gain not being authorized by Charter or Statute form an illegal association, if they exceed 10 in case of banking or 20 in any other case; or even if an originally smaller number subsequently increases beyond such limit without registration (*Ex parte Popplewell*). On the other hand, a smaller number than *seven* cannot be registered under Act of 1862. But under this Act there is no minimum proportion of shares, and therefore no *illegality* in a so-called "one-man company"—*e.g.*, of seven members where all shares except six are held by one man, and those six by his sons and servants, though this might be *fraudulent* at C. L. if steps were taken to misrepresent its true character (*Salomon* v. *Salomon & Co.*). A company registered under Act of 1862 may be (1) with unlimited liability of members, or (2) limited (a) by guarantee or (b) by shares. Perhaps most companies originally registered under (1) have now re-registered with limited liability. In 2 (a) liability is confined to respective amounts which members have in Memorandum of Association undertaken to contribute in case of winding-up; this method is rarely found except among insurance and a few banking companies. A somewhat similar effect may be produced under 2 (b) when it has been provided, as may be by *special* resolution, that whole

value of shares shall not be called for except for winding-up purposes. Thus (unlike Partnership shares) loss to shareholder can never exceed nominal value of share.

Every company limited by *shares* under the Act *must* have a "Memorandum of Association," and *may* also have "Articles of Association." The former in describing object and scope of company so fixes its character that no subsequent change can be made therein, except (1) by *special* resolution (a) to issue new shares (1862) or reduce capital (1867), (b) to divide into larger or smaller (1867) shares, (c) to convert paid up shares into stock (1862), (d) to render liability of *directors* unlimited (1867); (2) by special resolution and leave of *Board of Trade*, to change its name (1862), (3) by special resolution and leave of *Court*, (a) to make alteratons better to carry out main purpose, (b) change its area of operation, or (c) carry on some other business which can be conveniently carried on with original business (1890). Any attempt otherwise to tamper with Memorandum, *e.g.*, to take up totally distinct business, is *Ultra Vires*. Articles of Association, which may be wholly or partially those in Table A. of Act, may by special resolution be altered in any way not at variance with Memorandum. A resolution is "ordinary" when passed by simple majority or in other way fixed by Articles, at ordinary meeting; "extra-

ordinary" when passed, after due notice, by three-fourths majority at general meeting; latter becomes "special" when confirmed by simple majority at subsequent general meeting, after notice, between 14 days and a month later.

All the registered number of shares may be issued in first instance, or part only; in either case they may be divided into Preference and Ordinary shares, and any whole issue may be converted into stock. Thus there may be, *e.g.*, Preference Stock, A Shares, B Shares, Deferred Shares, &c., with priorities of dividend according to dates of issue or as otherwise provided. Such "stock" has no analogy with stock in Public Funds, or debenture stock. Those are consolidated annuities and other debts. Company stock is merely "a set of shares put together in a bundle" for convenience of transfer in large or small amounts, in all other respects it is merely another name for shares. A *debenture* stockholder is *creditor* of Co., an ordinary stockholder is member of it who shares in adventure and its risks. However, the same individual may hold both kinds of stock; he is thus at once both creditor and member of debtor-company. As shares may be lumped together under name of stock, so (under Co. A., 1900) the stock may be reconverted into shares, either under original power in memorandum or articles or by special resolution.

The Co. being formed proceeds to allot shares; this it can do only when the "minimum subscription" number (if any) has already been subscribed and paid for. Generally each director is bound to hold a qualification number of shares (often signed for by him in memorandum). The remaining shares, or so many as are in the first instance issued, are in the case of a "public" company offered to applicants in general, in a "private" company are confined to promoters and directors, and their relations, friends and other nominees; in this latter case the statutory requisites are somewhat less rigorous. If a prospectus accompanies the invitation to take shares, it must contain certain particulars; among others, the amount of "founders' shares" (if any), qualification of directors, minimum subscription, shares allotted on other consideration than cash payment, purchase-money of property, preliminary expenses, commissions, promotion money, directors, interest in promotion and property, and all *material* contracts made within three years before date not in ordinary course of business: all such disclosure cannot be waived. Just as issue by Registrar of certificate of registration marks commencement of Co., so allotment of and payment for minimum subscription shares mark date when Co. is entitled to commence business; any previous contracts provisionally made by Co. now become binding (1900).

A person usually becomes shareholder by filling up formal application, the Co. accepting his offer by sending letter of allotment subject to conditions of full immediate payment or by instalments. Legal proprietor has certificate on evidence of title, but trusts cannot be inserted on register. He is then liable to "Calls" on unpaid instalments enforceable by action, and (if so provided) by forfeiture of shares. Payment must generally be "in cash," *i.e.*, money or money's worth, including set off of debt *due* from Co. to allottee—*e.g.*, for past services, goods supplied, &c.; any other kind of consideration than "payment" must have been expressly set out in contract already filed with Registrar (1867, 1900).

In an old-standing Co. many or most shareholders will often be purchasers or sub-purchasers from allottees by private contract or (if Co. has obtained a Stock Exchange quotation) in open market, shareholder may transfer shares to whom he pleases, unless Co. by Articles or resolution has reserved right to refuse unsatisfactory transferees—*e.g.*, pauper, infant, &c. Contracts to sell shares are not within s. 4 of S. G. A., and so may be merely verbal; seller on Stock Exchange does not impliedly warrant registration. Sale of shares to directors is void, unless under special power. If no special provision, transfer in registered Co. follows form in

Table A. (1862).* In other companies, according to particular Act or rules, it may be by deed, parol with registration, and *semble* in "scrip companies" by delivery only. These are companies of less common kind which do not contemplate issue of formal shares but only scrip certificates; in an ordinary Co. this would entitle (not bind) scripholder to exchange scrip for shares. Either scrip or share warrants may be to bearer (1867), entitling holder for time being (1) to payment of dividends, (2) on surrendering warrant to be registered as member, (3) without registration to be member (on sufficient proof), but not qualifying him to be director or manager.

Generally, contract to buy or sell shares is for any shares of specified kinds up to particular value or number, but a contract to buy or sell shares or stock in *Banking* company is legally void under Banking Companies (Leeman's) Act, 1867, unless distinguishing numbers (if any) or names of registered proprietors are specified. Usage to contrary of any Stock Exchange is unreasonable as against persons without actual notice, but "customary" Stock Exchange contract is enforcible on proof of knowledge and intention to make such contract (*Seymour* v. *Bridge*). As nominal value of shares often varies from day to day, "Time bargains" or "Agreements to pay differences" are common.

* *v.* p. 94.

The Court will look through outward form at real substance of contract (v. *Re Gieve*); if proved to be merely colourable dealing with property, it is wagering contract void as between *principals;* if effected through *agent, semble* in ordinary cases he is entitled to recover *indemnity* against loss, and *commission* (*Thacker* v. *Hardy*), even since Gaming Act, 1892.

Proprietary rights and liabilities of shareholder, original or by transfer, may be considered by looking at him as (1) constituent unit of corporation, (2) member of majority, (3) of dissentient minority, (4) individual. (1) The company may buy, sell, contract as to its property with strangers, sue and be sued by them; but as to torts, in general it can be sued for tort only when committed by agent in *scope* of company business. Contracts of company or of promoters before its creation must be registered and named in prospectus, but Court may relieve in case of accidental non-registration of particular contract under Act of 1898. Promoters' contracts cannot be simply *ratified,* since no one can be agent for a not yet existing principal. But (a) performance of such contract may be provided for in *Memorandum;* (b) company may enter into *new contract* to same effect with same contractee; (c) if company has had benefit of such contract as it could itself have made, had it existed at date thereof, it may be subject to *equitable liability* in nature of estoppel (*Re Empress Engineering Co.*).

As to (2), he may take part in enforcing resolutions not *ultra vires* and properly passed—*e.g.*, may join in suing directors who have acted *ultra vires* or in unauthorized manner.

As to (3), though minority cannot directly prevent carrying out of any resolution properly passed and not *ultra vires*, it may sometimes invoke protection of Court against surprise or hardship. Dissentient minority may have injunction against *ultra vires* resolution (*Ashbury Carriage Co.* v. *Riche*).

As to (4), individual shareholder in respect of his property in shares has right to properly declared dividends, right to vote in manner settled by Rules, and right (equally with minority) to restrain acts *ultra vires*. Also, if he was induced to take shares by active misrepresentation or concealment of material facts, he has right (before winding up) to rescind contract, and sue company, directors, or promoters, in action of deceit, where representation was fraudulent as well as untrue in fact (*Derry* v. *Peek*). Contracts for sale of shares *by company* are *uberrimæ fidei;* and any contract of company, directors, or promoters (*semble* if *calculated to influence* applicant) must be specified in any subsequent prospectus or invitation to take shares (1862, s. 38). By Directors Liability Act, 1890, directors, promoters, secretary, &c., are liable to

compensate for loss by untrue statements, unless (a) fairly quoted and *bonâ fide* believed on authority of expert, or (b) made on reasonable grounds, or (c) made before such person was director, &c., or (d) notice was given by him denying previous knowledge of or assent to issue of prospectus; this throws on director, &c., burden of proof that statement untrue in fact is not also fraudulent in him.

Dividends are primarily payable out of profits, not out of capital. But they may (1) be paid out of true capital for limited period authorized by special Act; (2) out of such part of so-called "Debenture Capital," being sum total raised by borrowing on debentures, as has been allocated to revenue; (3) arrears of dividends on Preference shares may under Act of 1862 be made up out of subsequent profits; (4) in "wasting" business, *e.g.*, working mine under concession for term of years, "true capital" or actual assets need not necessarily be kept up to amount of original "nominal" or "share" capital, and dividends may be paid out of money representing the difference (*Lee* v. *Neuchatel Asphalte Co*). Or in other words it may be said that property of company at any moment includes "Fixed capital" for retention and "Circulating capital" for sale at profit—*e.g.*, in drapery business, premises and investments are "fixed," stock in trade is "circulating." The former may not be

tampered with for dividends; the latter in proper case may be.*

In Co. limited by guarantee and not divided into shares neither Memorandum, Articles, nor special resolution can authorize any non-member to participate in profits.

Death of shareholder has not, as in partnership, any effect on company; shares with incident rights and liabilities pass to executor or administrator, who may be registered or have nominee registered as member. But dissolution by Winding up extinguishes share property. Winding up is (1) voluntary, (2) subject to supervision of Court, or (3) compulsory under Order. (1) is (a) on completion of time or occurrence of event as provided in Articles, or (b) by special resolution, or (c) by extraordinary resolution on pressure of liabilities: company appoints liquidator and preserves general control of affairs for winding up purposes. Three months after final account submitted by liquidator to general meeting and return registered, company is "deemed to be dissolved," but *semble* on proof of fraud or other good reason winding up may be avoided and company rehabilitated (*Re London & Caledonian Insurance Co.*). Before such dissolution, dissatisfied creditors or shareholders may for good cause obtain (2) supervision Order, or (3) Order for compulsory winding

* 1. Buckley's Companies Acts, pp. 554—560.

up. Effect of (2) is to allow voluntary winding up to continue subject to any further Order or Orders. Grounds for (3) are (a) special resolution, (b) year's non-commencement or cessation of business, (c) want of minimum seven members, (d) insolvency, (e) any other reason making it "just and equitable"—*e.g.*, business becoming impossible. Company ceases to exist from date of Order except for winding up purposes: there can be no transfer or disposition of property nor action, distress or execution against company, except by leave of Court; even between presentation of petition and Order Court *may* restrain action already begun. "Carriage" of Order is generally given to petitioner, who may be creditor or contributory; unsatisfied creditor has right *ex debito justitiæ*, contributory is subject to discretion of Court. Debenture holders cannot generally as creditors call for winding up till they have resorted to their special remedies. Insolvency of company is inferred (*inter alia*) from (1) unsatisfied execution, or (2) signed demand for not less than £50 unpaid for three weeks.

Winding up, under Act of 1890, is before Bankruptcy Judge; Official Receiver is "provisional liquidator" until another is appointed, and there may be "committee of inspection" appointed by Court. Separate meetings are held of creditors

and contributories—*i.e.*, holders of not fully paid up shares. Liquidator settles such present members on "A. List," and such as were members within last twelve months on "B. list," as liable for debts of company incurred while they were members and then only if present members cannot pay in full. Dividends due to contributors can be set off as against other contributors, not as against creditors. Secured creditors of insolvent company are subject to bankruptcy rules.* Fraudulent preference or general assignment of company property to trustee for creditors is void. Directors past or present guilty of misfeasance or breach of trust may be ordered to repay or contribute. Court must, if required, order dissolution on *full* winding up, but it is generally difficult to say when chance of future assets turning up has completely ceased. Voluntary winding up is frequently of solvent company for purpose of forming new and more extended one. Companies wound up by Court are generally insolvent; accordingly Act of 1890 assimilates proceedings to those in bankruptcy, and they are taken before same Judge, who sits in bankruptcy as C. L. Judge, in winding up as Judge of Ch. D.

There are numerous Societies formed by or for benefit of working men, and regulated by Statutes. The chief are (1) Building, (2) Friendly, (3) Indus-

* E. R. P., p. 42.

trial and Provident Societies. (1) are (a) incorporated under Acts from 1874 to 1894, or (b) unincorporated but governed by Act of 1874: they are also (i.) "terminating" on fixed date or event, or (ii.) "permanent"; their object is to raise a common fund for advances to members on mortgage for building. (2) *may* be incorporated by registration with Public Registrar; they are governed by Acts from 1829 to 1896 and statutory rules; their object is mutual insurance in sickness or distress or on death, &c.; their property is vested in trustee or trustees. (3) are regulated by Acts of 1893 and 1895, and incorporated by registration with same Registrar as (2): their object is carrying on various kinds of business, including banking.

Statutory form of transfer of shares in ordinary registered company (in Table A.) is shortly thus:—

"I, A. of ——, in consn of £—— pd to me by B. hby transfer to sd B. shares numbered —— standing in my name in books of —— Co. to hold unto sd B. exors &c. subject to condons on wh I held at time of exon hrof; and I the sd B. hby agree to take sd shares subjt to same condons. As witness our hands the —— day of ——.

"(Signed) A.

B."

This may be under seal or not; usually it is: it has *ad valorem* stamp, and authorizes transferee to call for entry of his name on register, unless he is objected to under some special Article of the company.

CHAPTER VII.

PATENT—COPYRIGHT—TRADEMARK—GOODWILL—OPTIONS.

THE five above-named forms of property are here grouped together as being in the highest degree indefinite and speculative. In other respects they have little in common. The first three are State-created rights *in rem*, and therefore not strictly choses in action at all. Thus they might be taken as a separate class,* but are conveniently placed here as resembling class ii. of choses in action (1) in having no definite subject-matter as a necessary incident, (2) because their legal character consists in right to bring action or other proceeding, (3) because they are equally speculative with the rest of class ii. The fourth is a right in nature of property springing out of circumstances; the fifth springing out of contract is a true chose in action: both fourth and fifth have no standard of value whatever except what contracting parties agree to put on them.

I. Patent-right, shortly termed "Patent," is

See Analysis, p. 141, for more scientific classification.

analogous to franchise, being Crown grant under Prerogative of monopoly or exclusive right of making or vending some article possessing *novelty* and *utility*. St. of Monopolies (21 Jac. 1) confined this exercise of prerogative to grant of Letters Patent for term of 14 years to "first *inventor* of new manufacture "within *realm*." Details are regulated by Acts of 1883 and 1888. Patentee must be first to publish invention in U. K., though it may already have been privately discovered by some other here or publicly used abroad. Manufacture or invention may be (1) new product, (2) new machinery, (3) new process by new method of carrying out (a) old principle or (b) new principle. Thus there must be substantial novelty without prior publication, and *evidens utilitas*, of which attempt at infringement is best evidence.

The legal right is obtained by the following steps. First, *application* at Patent Office with *declaration* by applicant as inventor or importer, and "provisional" or "complete" Specification with title disclosing subject-matter. If provisional, it describes generally but intelligibly nature and identity of invention, even though details be not yet matured. Complete specification with declaration or within nine months (a month more by leave) must particularly describe details of *same* invention, so that (1) no one can inadvertently infringe it, and (2) on

expiration of patent, public may have benefit of it; it must then by words with or without drawings be fully intelligible to ordinary *skilled* workman, must be *uberrimæ fidei* without misleading by suggestion or omission, and must end with claim showing wherein novelty consists.

Acceptance by Comptroller on Official Examiner's report is advertised. Amendment may be required as condition of acceptance subject to appeal to "Law Officer" (Attorney or Solicitor-General), or in form of part-disclaimer by leave of Comptroller or Court, but so that amended specification shall not be substantially larger or different. Opposition to grant may be based on (1) obtaining of invention from opponent or his representative, (2) earlier patent, or (3) earlier specification: validity is decided by Comptroller, with appeal to "Law Officer" with or without expert, before appeal to Court. "Provisional protection" between acceptance and sealing licenses applicant to use invention pending grant, which becomes complete by sealing and stamping and extends throughout British Isles. On ground of inadequate remuneration during term shown in petition to Privy Council, seven or even (very rarely) 14 more years may be added.

Value of patent as property consists in (1) power of making and selling, (2) licensing others to use on payment of royalties, &c., (3) assigning generally

or for particular districts by way of sale or mortgage. Assignee can sue at law in his own name, but takes subject to equities. If patentee does not work his invention or cannot himself do so advantageously or so as to supply reasonable requirements of public, Board of Trade may compel him to grant licences on fixed terms. A deed appears to be strictly necessary at law for either licence or assignment, though parol agreement may give assignee an equitable right.

Actions for infringement turn very much on expert evidence; when this is contradictory, Court may call in independent expert evidence (*Badische Anilin Fabrik* v. *Levinstein*). If patentee allege infringement and threaten action without bringing it promptly, person thus threatened may sue for injunction and damages but only on proof of non-infringement (*Barney* v. *United Telephone Co.*). Patent-right, besides expiring by efflux of time, may be revoked on petition of Attorney-General, or other showing (1) fraud, or (2) that he or one through whom he claims (a) invented or (b) previously used alleged invention.

II. Copyright is exclusive right of multiplying copies of original literary or artistic work for publication or sale. It applies to (1) books, periodicals, printed sheets, maps and plans, dramatic and musical compositions; (2) subject-matter of *oral* lectures;

(3) engravings, prints, paintings, drawings, photographs; (4) sculpture; and (5) designs for manufactured articles. There was and is a C. L. right in perpetuity as to *unpublished* writings; if this in any form ever extended to the same after publication it is now superseded by statutory right first provided in reign of Anne. Perpetual copyright is still secured for books published by the two older English and four Scotch Universities and Colleges of Eton, Westminster, and Winchester, under Act of 1774. The whole subject has been dealt with piece-meal; thus head (5) though correctly spoken of in Acts as "copyright" is joined with patents and controlled by Patent Office. Head (1) is governed by Acts from 1842 to 1888, (2) is under Act of 1835, (3) under Acts from 1735 to 1862, (4) under Act of 1814, and (5) under Acts of 1883 and 1888.*

1. Copyright in books, &c., published in U. K., by subject or resident foreigner, for author's lifetime + 7 years, or 42 years from first publication, whichever longest, belongs to author and assigns, throughout British dominions. For *paid* articles in encyclopædia or periodical it belongs for 28 years to publisher or proprietor, then reverts to author for remainder of above term. Sole representation of dramatic or musical composition belongs to author

* A codifying and amending Bill is before Parliament, but it is doubtful when it will be passed.

and assigns for same term from first *public* representation. Registration at Stationers' Hall is requisite for action or assignment; for assignment a deed is not necessary.

Infringement is by (1) "Piracy," or (2) "Literary Larceny."* (1) consists in publishing unauthorized copies, or importing them, whereby they become forfeited. (2) is by publishing works containing *substantial* portions (a) copied *verbatim* without authority, or (b) with merely colourable alteration. (1) is a simple question of fact. (2) is more difficult to judge, especially as publication imports right of general public and succeeding authors to make proper use of already published matter. Infringement of kind (2) seems to depend on three tests:—(i.) no independent intellectual labour, (ii.) matter not employed for different purpose, (iii.) it causes later work injuriously to compete with earlier. Dramatizing and representing another's novel is not *per se* infringement (*Reade* v. *Conquest*), but even manuscript or typewritten version for use of actors only, if containing almost verbatim copied portions, supports action (*Warne* v. *Seebohm*). *Semble* there can generally be no copyright in mere title of book, but it is C. L. fraud for A. to call book by same title as B.'s in order to pass it off as same book (*Dicks* v. *Yates*). The proprietor of daily paper as

* Per James, L. J., in *Dicks* v. *Yates*.

periodical may register paid contribution and sue on infringement (*Walter* v. *Howe*). Though there is no monopoly of news, there may be copyright in form of expression of such news (*Walter* v. *Steinkopff*). But when a speech orally and openly delivered is taken down by different reporters, no report not specially arranged for by speaker is capable of copyright (*Walter* v. *Lane*). There may be copyright in different translations of same foreign book. But by Order in Council under Acts, 1844—1886, there may be copyright established in books, &c., first published *abroad*, and prohibition of unauthorized translations of them in England.

2. By Act of 1835 there is penalty for unauthorized publication of lecture (not at University or public school) on premises licensed after two days' written notice to two justices. This adds little to C. L. rule as to unpublished compositions, and speaking, reading or lecturing to ticket-holders or other restricted audience is not publication (*Caird* v. *Sime*).

3. Copyright in engravings by earlier Acts and by later ones in paintings, drawings, and photographs, is vested in "author" and assigns. If picture or photograph is taken "on commission" for payment, it would seem there can be no copyright without written agreement providing whether copyright shall on registration vest in author or in

person for whom picture is made. Where two or more are engaged in mechanical processes of photographing, it may be difficult to say which is "author" (*Nottage* v. *Jackson*), unless copyright is claimed for one who was present and had full control over the taking (*Melville* v. *Mirror of Life Co.*).

4. Copyright in sculptures, models, and casts is vested by Act of 1814 in person "making or causing same to be made" for fourteen years from first "putting forth," assignable by deed attested. "Putting forth" seems to be erection in public place, or exhibition at Academy, &c.

5. By Act of 1883, design is "pattern, shape, configuration, or ornament," of "article of manufacture" or "substance;" proprietor of copyright is (a) author of new design, (b) assignee for value, or (c) person on whom right under (a) or (b) devolves. Registration in Patent Office lasts five years, but ceases if (i.) representation or specimen is not sent to office before any delivery on sale, or (ii.) article sold is not marked with reference to register, or (iii.) use within six months after registration has been exclusively abroad. Assignment or licence must be registered. Infringement (subject to penalty) is by (a) applying such design without licence to article within registered class, (b) exposing article so treated for sale, or (c) falsely describing unregistered article as registered.

III. At C. L. there was no property in *Trade mark* or symbol of maker denoting goods of his own make, but it was actionable fraud for A. so to mark goods in order to lead buyers to believe them erroneously to be B.'s make. Under Acts of 1883 and 1888, property in trade mark is vested in proprietor registered at Patent Office. Trade mark must include either (1) name, (2) signature of person or firm, (3) distinctive device, (4) *invented* word, or (5) word neither geographical nor referring to character of goods. Thus, under (3) Maltese cross, crest, &c., not already on register in name of another would be valid; under (4) word may be *descriptive*, if *new*, *e.g.*, "cycloline" for oiling bicycles; under (5) "Greenland" whalebone or "Detersive" soap would be bad. Registration must be under particular class of goods, and registered colour does not preclude other colours for same trade mark. Appeal from refusal of Comptroller lies to Board of Trade, which must, "if expedient," refer question to Court. Assignment can be made only with sale of goodwill; it may, but need not, be registered, and does not require a deed. Registration is *primâ facie* evidence of public user, conclusive after five years, unless registration itself was wrongful. Register may be rectified by striking off name at instance of "person aggrieved," *e.g.*, where trade mark is identical with earlier one, or so like as to be "calculated to

deceive." Trade marks on cutlery or the like in Hallamshire (*i.e.*, Sheffield and neighbourhood) must be entered on Sheffield Register of Cutlers' Company. By Merchandize Marks Acts, 1887, 1891, it is punishable falsely to allege registration, or import foreign goods with mark of British maker, &c.

It is sometimes said that "trade names are *in a certain sense* property" (Per Lord Blackburn in *Singer Co.* v. *Loog*) quite apart from use as registered trade marks. This has been denied by eminent Judges, and it does not appear that any one can gain an *exclusive* right to such name; it is not true property merely because he can restrain others from using it through fraud or negligence in such a manner as to deceive to his detriment.

IV. Goodwill is a species of property and recognized asset of business or firm, generally assignable, sometimes of high value, though one of the vaguest of all such kinds of property. It is (1) professional, or (2) trade goodwill. The first depends so largely on *personal* qualifications that it is no more than the chance that clients who have confidence in retiring doctor, solicitor, &c., will listen to his recommendation, and at least afford some trial of assignee's merits. The second, connected with business premises, is more typical. Its limits have been much disputed; perhaps there has been some

confusion between two distinct notions, viz., old customers' goodwill towards assignor, and assignor's goodwill towards assignee. It is now settled that it is not merely (as was once thought) the "probability that old customers will resort to old place," but further "whole advantage of reputation and connection" of assignor (*Trego* v. *Hunt*). Hence assignment is of questionable value without *express* restrictive covenants; otherwise assignor may set up similar business even next door, and deal with old customers, though he may not solicit them, nor of course represent his as the old business.

V. Options are one of the most recent inventions in the way of property, and hardly yet recognized as such. Thus A. or the X. Co. may contract with B. for value empowering him, if he chooses within limited named period, *e.g.*, to call for allotment at fixed price of plot of building land not exceeding named size, to take similar assignment of so many shares,* and the contract may be so constructed as to extend to B.'s nominee, assignee, or representative. It has then an uncertain money value as property, which may be transferred *inter vivos* or devolve on personal representative; if of shares in yet undeveloped mine, it may turn out worthless, or on the other hand of enormous value; so in

* Scrip is thus a particular example of this class, "underwriting shares" is another.

lesser degree when it takes shape of dealing in "futures," such as next year's crop of wheat, hops, strawberries, &c. In any case, until option is exercised the right is purely one of contract.

We now see that in all kinds of property falling under class i. of choses in action, the owner has *legal* claim to determinate or determinable sum, even though his debtor may not in *fact* turn out to have available assets. In all cases under class ii. there may be a *nominal* value assumed as basis of contract, but the real value may prove to be more or less or zero, or sometimes a minus quantity; also we see that in all the five kinds treated of in this chapter the right is an exclusive right to do certain *acts*, whether or not such acts are really done, or any tangible result produced by them, and whether or not such acts are worth doing, or their results of any pecuniary value: thus class ii. is speculative, and these five kinds most of all so. Both classes are however frequently subject of assignment, out and out or else by way of mortgage. As examples, we may look at assignment of bond debt and policy of life assurance, and mortgage of same. The former may be somewhat as follows:—

Parties (1, A., vendor. 2, B., purchaser). *Recitals* (1, Bond. 2, Debt owing. 3, Policy. 4, Premiums pd to date. 5, Agreemt to assign). 1st *Testatum*

(sd A. as beneficial owner hby Assigns to sd B. ALL THAT hinbefore reced Bond). *Habendum* (TO HOLD same UNTO sd B. exors &c. absoly). 2nd *Testum* (sd A. as beneficial owner hby assigns unto sd B. hinbefore recited policy with full benefit throf and of all moneys thrunder). *Habendum* (. . . UNTO sd B. exors &c.).

Mortgage will have three testata, first covenanting to pay principal and interest; second assigning policy subject to proviso for redemption, with covenants by A. to keep up policy, &c., and proviso enabling B. on A.'s default to pay premiums and add amount to mortgage debt, and further proviso for redemption. Third testatum may be in form of assignment on trust of bond debt as chose in action under J. A., in which "sd A. as beneficial owner hby Assigns sd B. hinbefore recited bond and all rights thrunder UPON TRUST that sd B. shall receive amount secured by same pay throut expenses retain amount of mortgage debt and interest (if any due) and pay surplus (if any) to sd A."

Assignment of *equitable* chose in action, *e.g.*, money in Court, would generally contain express power of attorney for B. to demand and sue in A.'s name. It would be followed up by written notice to obligor of bond, or stop order, &c., as case might be.

Having now completed our survey of the different

kinds of personal property or chattels personal, we see that there are three ways in which a man may have a legal claim, which being enforced results in his receipt of (say) £100. (1) He may receive it as money in a sealed bag or otherwise earmarked; similarly, if having right to delivery of horse he agrees to accept payment of £100 as performance: his claim was then all along *liquidated* and *specific*. (2) He may receive it as a debt, *e.g.*, amount of a bond: his claim was then all along *liquidated* but *non-specific*. (3) He may receive it as the ultimately ascertained value of a share or other right of originally uncertain value: his claim was then at first *unliquidated* and *non-specific*, eventually becoming liquidated by verdict of a jury, finding of a Judge, award of arbitrator, certificate of Master as result of accounts and inquiries, &c. All personal chattels are of one or other of these three types. The first are known as choses in possession. We have found it convenient to group all rights under (2) and (3) as choses in action, though we have seen that some, being rights *in rem*, might be more correctly described as "choses in quasi-possession." And we know as a matter of common experience that, where a man is rich in personalty, the bulk of such property will more commonly consist not of choses in possession but of his investments, which may be either true or *quasi* choses in action.

CHAPTER VIII.

INVOLUNTARY ALIENATION.

As power of alienation is a most important element in ownership, so is liability to involuntary alienation a no less necessary incident. As to personalty, it occurs chiefly through or in connection with Statutes of Limitation, Distress, Execution, and Bankruptcy.

I. Statutes of Limitation affecting personalty are principally Limitation Act, 1623, and Civil Procedure Act, 1833. The old St. of James I. as interpreted in cases fixes time for recovery of choses in possession or in action on simple contract, or otherwise not on contract under seal or express trust, at six years from (a) date when action could *first* be brought, or (b) payment on *account*, or (c) acknowledgment amounting to *promise* to pay, which last must by St. Fr. A. A. be in writing signed by *debtor*, or (by M. L. A. A.) by his *agent*. Time runs from removal of disability, if *creditor* or other entitled to sue is infant or lunatic. Imprisonment and absence beyond seas are not disabilities since M. L. A. A., nor is coverture practically so since M. W. P. A.; no disability arising *after* time has

once begun to run extends period. By St. of Anne, time runs from return of *debtor* who at accrual of right of action was "beyond seas," *i.e.* (by M. L. A. A.), outside of British Isles. As a general rule any joint-debtor can require joinder of all co-debtors, and merger on judgment against one bars action against others (*Kendall* v. *Hamilton*), but here by St. Fr. A. A. *acknowledgment* by one extends period against him alone, and by M. L. A. A. if one is *beyond seas*, others can be sued only within ordinary period, and he within six years from his return. Time continues to run after death of creditor or debtor, if cause of action survive in person capable of bringing it. Period is still six years, even if simple contract debt is charged on *land* (*Barnes* v. *Glenton*).

Under the later St. of William IV., time for action on specialty contract is 20 years, subject to corresponding provisions as to acknowledgment, disability, &c. This includes rent in action on covenant, and debt of contributory to company. Under both Statutes, time ceases to run on (1) receiving order in bankruptcy, (2) administration decree in case of deceased debtor, and (3) winding up order against company.

In Real Property, we saw that statutory limitation was indirectly an *investitive* fact of ownership. We have now to see how far, in personal property, it is

directly or indirectly a *divestitive* fact. (1) As to choses in possession, if A. by lending or otherwise bails a chattel to B. who erroneously accepts it as gift, and keeps it over six years without demand from A., his possession being thus adverse to A.'s claim, A. loses right to sue for the chattel. Thus A.'s right of *action* is barred, but his rights of *ownership* are not thereby extinguished. Hence, if (a) B. promises in writing (even after six years) to return the chattel, or (b) it comes again into A.'s possession during B.'s lifetime by any lawful means, or after his death, *e.g.*, by A. being his executor, &c., A.'s right of ownership, which was merely dormant, revives in its fulness.

(2) As to choses in action, A. after six or 20 years merely loses right of action for debt, but (a) this revives on any (even *subsequent*) written promise to pay or payment on account; (b) A. can enforce any lien he has chance to enforce; (c) if B. owes him other later debts and pays on account without *appropriating* payment to them, A. can appropriate to earlier statute-barred debt; (d) if A. become B.'s executor or administrator, he can "retain" amount of his claim as against other creditors of *equal* degree; (e) if he sues B. even after six or twenty years, and B. does not *expressly* plead the Statute, length of time, though obvious, is no bar against A.'s recovering judgment; (f) if chose

is a debt secured by mortgage of *personalty*, A. can sue for foreclosure or sale after debt itself has become statute-barred (*London & Midland Bank* v. *Mitchell.*)

Thus, while in Real Property lapse of time directly extinguishes original title and so indirectly raises title in adverse possessor, it is otherwise in Personal Property. Long possession of chattel gives no absolute title. Indirectly of course it is apt to obscure evidence, and as *Melior est conditio defendentis et possidentis, bonâ fide* long possessor of chattel is generally in practice secure.

II. Distress is remedy on some omission or negligence of owner of chattels, especially by non-payment of rent. Distrainor's C. L. right is akin to pledge under which distress gives qualified right of possession without working alienation of property in goods, but by Distress Act, 1689, and other Acts, landlord can sell and pass property to purchaser. Conditions for right of distraining for rent to arise are (1) *demise*, express, by estoppel, or by agreement enforceable in Equity; (2) *reversion* in distrainor; and (3) rent in *arrear* payable at time *certain*. All non-privileged goods on premises are distrainable, but goods of *stranger* may be redeemed by owner and cost charged to tenant. Privilege is (1) absolute, or (2) qualified (*sub modo*).

(1) Absolute privilege arises (a) at C. L., (b) by St. Under (a) fall (i.) Things in *personal* use at

time; (ii.) Fixtures; (iii.) Goods of stranger delivered to tenant to be wrought on in his *ordinary* trade; (iv.) Perishable goods—*e.g.*, fruit, milk, &c.; (v.) Animals *feræ naturæ*, but *semble* dogs are distrainable; (vi.) Goods *in custodiâ legis*—*i.e.*, already seized by sheriff in execution; (vii.) Loose money. Under (b) are (i.) Wearing apparel, tools and bedding up to £5 in all (1888); (ii.) Agricultural machinery and live stock for breeding (Ag. Holdings A., 1883); (iii.) Lodgers' goods under certain regulations (1871); (iv.) Apparatus of textile manufacture (1844); (v.) Railway rolling stock (1872); (vi.) *Severed* crops and farming stock (1816); (viii.) Gas, Water, and Electric fittings (various public and private Acts).

(2) Qualified privilege is privilege only where other sufficient distress can be found. It arises (a) at C. L. as to (i.) Tools of trade not in actual use (*Simpson* v. *Hartopp*), now beyond £5 limit; (ii.) Beasts of plough; (b) by St., viz., as to (i.) *Growing* crops (1851); (ii.) Agisted cattle—*i.e.*, taken in to pasture, under certain regulations (1883).

Lodgers must serve declaration and inventory, and pay to distrainor rent (if any) due to occupier. Agisted cattle can be taken only for amount (if any) due from owner to agister for feeding, and until sale owner can redeem by paying this amount to distrainor.

Other details of distress belong to special law of Landlord and Tenant or to Procedure: enough to say that distrainor must enter *peaceably* in person or by duly licensed bailiff between sunrise and sunset; make *inventory*, leave written *notice* of rent due and goods distrained, and after *appraisement* five days from seizure may *sell* but must pay balance over rent and costs back to owner. He may distrain on *over-staying* tenant; so may his executor within six months after expiration of term. Where tenant is bankrupt, landlord can recover by distress only six months' arrears due at date of adjudication (B. A., 1890). Goods wrongfully seized are recoverable (1) by action of replevin, (2) in cases within Act of 1895 by summary Order of Magistrate.

Distress on cattle damage feasant merely authorizes their detention, and does not work alienation of property. Distress (so-called) for poor and highway rates and penalties, being under "distress-warrant," is rather execution than distress proper.

III. Execution is after *judgment*, under which creditor usually (a) sues out writ of *fi. fa.* (*fieri facias*), &c., or (b) applies for garnishee Order. (a) *Fi. fa.* is order to sheriff "that of goods and chattels of A. B. in your bailiwick you cause to be made the sum of £—— and also interest at 4 p.c. . . . in a certain action . . . adjudged to be paid by the said A. B. to C. D. together with certain

costs." Under this writ, sheriff may seize and sell debtor's goods, except wearing apparel, &c., up to £5, fixtures, and goods already seized in other execution, but not goods of stranger; by Judgment Act, 1838, he may also seize "securities," *i.e.*, cheques, bonds, &c., and sue thereon. If judgment debt exceeds £20, he must (1) on *notice* of receiving Order between seizure and sale hand over on request all goods and money less amount (if any) claimed by landlord for rent (*Re Neil Mackenzie*), to Official Receiver or trustee in bankruptcy; (2) sell only by public auction; (3) for 14 days keep sale-moneys *minus* costs of execution, and then, if debtor has not meanwhile been adjudicated or notice under (1) received, deliver them to execution creditor. Judgment debtor can, by M. L. A. A., at any moment before actual seizure make good title to *bonâ fide* purchaser for value without notice of writ of execution.

(b) Garnishment is "attachment" by creditor of debts due from third person to judgment debtor; it is thus *involuntary* assignment of choses in action. If A. owes money to B., and B. to C., who recovers judgment against B., C. may apply for Order that (1) if he knows of A.'s debt, all debts due or certainly payable at *fixed* future time from A. to B. be attached, or (2) if he does not know of such debts, that B. be examined as to debts due to him, and

from whom. Service of garnishee Order binds debts in hands of garnishee, *i.e.*, (a) A. cannot thereafter pay B.; and (b) if A. or B. become bankrupt, C. is "secured creditor" in priority to others. By ancient custom of Cities of London and Bristol, "Foreign attachment" lies against goods and debts in hands of or due to defendants being persons (not corporations) in jurisdiction of Lord Mayor's Court and Bristol Tolzey Court.

Equitable execution by appointing receiver applies to personal property which cannot be taken under *fi. fa.*, *e.g.*, future income of fund in hands of trustees or in Court. It does not apply to married woman's future income restrained from anticipation. Nor does it alienate *corpus* of debtor's property. Nor again does writ of Sequestration, under which property of debtor corporation, or individual ordered to pay into Court or do other act in limited period, is taken by four or more commissioners who hold it as security until payment or other performance. So too writ of Delivery changes possession, not property, against detaining tort-feasor or vendor under Sale. Execution and all other proceedings on judgments, *e.g.*, proving debt against estate under administration, are barred after 12 years by R. P. L. A., 1874 (*Hebblethwaite* v. *Peever*).

IV. Bankruptcy was long treated as a crime leading to forfeiture. Until 1861, only *traders*

could be made bankrupt; under Act of 1838 non-traders might petition "Insolvent Debtors' Court" for discharge from prison. Law has since oscillated between principle that creditors best know their own interest and contrary principle of official control, to which latter side Acts of 1883 and 1890 lean. We notice only provisions more directly bearing on Personal Property Law.

Bankrupt is one so "adjudicated." Conditions are (1) Petition by debtor, or by creditor or creditors for debt amounting to £50 certain and liquidated; (2) "Act of bankruptcy" within three months before petition; (3) Domicile here of debtor, or ordinary residence within previous 12 months, or having dwelling or business house in England. Chief acts of bankruptcy are (1) assigning property for creditors generally; (2) fraudulent conveyance or preference; (3) leaving England or shunning creditors to defeat or delay them; (4) sale of goods under execution; (5) intimating his own insolvency; (6) "bankruptcy notice" by judgment creditor unsatisfied for seven days. Persons capable of contracting can generally be made bankrupt, *e.g.*, married woman trading apart from husband may be as to *separate estate*, but neither infant nor adult for ordinary infancy debts; *semble* he can be for necessaries, but not for *equitable* liability by fraudulent representation that he was of full age.

Petition is presented to High Court or County Court of debtor's business place in preceding six months. Court may then by "Receiving Order" appoint Official Receiver to receive and manage as officer both of Board of Trade and of Court, who calls First meeting of creditors who may (subject to Court's ratification) decide on Composition or Scheme of arrangement; otherwise Court adjudicates debtor bankrupt, whereby all his property vests in "Trustee in bankruptcy," *i.e.*, Official Receiver or other appointed by creditors or by "Committee of inspection." Thus Adjudication marks point of alienation of property. Trustee (1) alone may sell and exercise powers which bankrupt could have exercised for his *own* benefit; (2) along with committee (if any) can *inter alia* mortgage, pledge, compromise debts to or from estate, and divide *in specie*.

Property vesting in trustees (a) includes (1) realty and choses in possession of bankrupt; (2) choses in action; (3) powers for his benefit; (4) property of others in his "order or disposition" in his trade or business so that he is "reputed owner." It (b) excludes (i.) tools, clothes, bedding, of self, wife and children up to £20; (ii.) property held on trust for others; (iii.) power of nomination to vacant benefice; (iv.) general power of (unexercised) appointment by married woman (*Ex parte Gilchrist*);

(5) choses in *action* of others, except *trade* debts which fall under (4) above. "Property" under B. A. is wider than in its general sense; thus it includes mere powers, and under a (2) trustee may assign to another rights of action which bankrupt himself could not have assigned, *e.g.*, right to sue in tort, to sue on purely equitable ground for cancellation of instrument (*Seear* v. *Lawson*), &c. As to a (4) "business" is somewhat vague; thus it is business to make *livelihood* of farming, but not to farm land round house for home supply, even if surplus produce is sold (*Ex parte Sully*). And reputed ownership is negatived by any notorious trade usage, *e.g.*, hiring system of furniture by hotel-keeper (*Ex parte Turquand*); also by proof of property being on trust under b (ii.), but this even in alleged bailment must be strictly proved. As to b (iv.), if donee of power has already appointed to herself, this is obviously separate property; if to another, unless appointment itself was fraudulent, property remains in appointee: where appointment has not been made or has been made in favour of another, donee, if she has nothing else in the way of separate property, cannot be made bankrupt. Part of pay, half-pay, or pension of Army or Navy officer or Civil Service clerk may be appropriated to creditors on terms arranged between Court and Head of department.

Voluntary settlement, *i.e.*, without *fair* equivalent, in fraud of creditors may be of whole or substantially whole property necessarily importing fraud, or of smaller part where fraud is proved. It includes, by M. W. P. A., money deposited or settled by husband in wife's name in fraud of creditors. But *till* bankruptcy any voluntary settlement is only voidable, not void; hence purchaser for value from volunteer between dates of settlement and of bankruptcy gets good title (*Re Carter* v. *Kenderdine*). Even conveyance for *value* (not in ordinary way of business) to transferee (a) with notice of act of bankruptcy and within three months before petition, or (b) *after* receiving order, is void. So is fraudulent preference of particular creditor or creditors, if made within same time and voluntarily—*i.e.*, without *substantial pressure* from creditor.

Until disclaimer or assignment of onerous property, as leases, part-paid shares, contracts, &c., trustee is personally liable, but he may disclaim within 12 months of appointment or of first knowledge of such property; in case of leases generally only with leave of Court, except where annual value of leased property is less than £20, or estate of bankrupt probably not more than £300, or lessor after seven days' notice does not appeal to Court.

Bankruptcy has important effect on choses in action due from bankrupt to creditors. A. has legal

right to £100 due to him from B., though B. be insolvent. But if further B. is adjudicated *bankrupt*, (1) A.'s right of action is suspended; (2) A. is bound by dividends declared, and his legal claim is thus diminished to rateable share afforded by B.'s assets. To obtain this A. must "prove" in bankruptcy—*i.e.*, state and substantiate claim before trustee, with appeal to Court. Special rules of proof are that (1) secured creditors may prove only under certain conditions*; (2) partnership property is primarily liable for firm debts, separate property of each partner for his private debts; hence *primâ facie* firm cannot prove against partners, nor partners against firm; (3) if debt is due from joint and several debtors to joint and several creditors, latter can prove against both joint and several estates; (4) married woman can prove for loan to husband "in his trade or business or otherwise" only after other creditors are satisfied. In connection with (1) it may be noticed that, by Rule in *Ex parte Waring*, if A. draws bill accepted by B., and A. and B. agrees that bill is to be paid out of particular fund or security, then if both A. and B. are bankrupt, and holder C. has right of proof against each, C., whether or not he knew before that fund, &c., was so appropriated, has first right to payment thereout. Provable debts may be present or future, certain or

* E. R. P., p. 42.

contingent, liquidated or unliquidated on contract, but they must be liquidated when arising otherwise, *e.g.*, in tort when liquidated by judgment or compromise. Set-off is allowed up to date of commencement of bankruptcy—*i.e.*, by "relation back" up to date of *first* available act of bankruptcy within three months before *petition*, whether or not petition was founded on such act, or before Receiving *Order* by Bankruptcy Judge under Debtors' Act. Trustee, subject to appeal, must estimate contingent liabilities. One year's local *rates*, and four months' *salary*, or *wages* of clerks, servants, or workmen, are if possible to be fully paid before all other debts.

During bankruptcy, creditors can sue only by leave, and Court may restrain actions already pending. Trustee may sue in matters affecting bankrupt's *property;* bankrupt only as to *personal* injuries—*e.g.*, breach of promise, libel, &c.; causes of action affecting person and property are "split," and each may sue. Out of all property personally acquired by bankrupt, amount reasonably sufficient for support is his; to all beyond this limit, unless and until claimed by trustee, he can give good title to transferee even with notice of bankruptcy, but trustee can claim it as against bankrupt.

Order of discharge releases bankrupt from all claims, except *Crown* and *Revenue* debts and those arising out of *fraud* or fraudulent breach of trust.

On various grounds, *e.g.*, payment of less than 10*s.* in pound, trading after insolvency, fraud, extravagance, rash and hazardous speculation, &c., discharge may be refused, suspended, or granted on terms of liability as to *after-acquired* property.

Composition or scheme of arrangement does not alienate insolvent's property *en masse;* they can be made only by leave of Court, which *must* be refused if unreasonable or non-beneficial to creditors (1890). Private deeds of arrangement with creditors are void unless registered within seven days, under Deeds of Arrangement Act, 1887.

Estate of deceased insolvent may be administered (1) in Ch. D., or (2) on *creditor's* petition in Bankruptcy, or on his application transferred from first to second. The first works no alienation of property; the second does, vesting it in Official Receiver.

CHAPTER IX.

ADMINISTRATION.

THE general rules as to Wills and devolution of property have been considered under Real Property and Chattels Real. Down to about end of 17th century power of bequeathing personalty was limited in City of London and some other places by rule of *partes rationabiles, i.e.*, right of wife *and* issue to two-thirds, wife only *or* issue only to one half, and it had once been doubtful whether this was not originally general rule. Though nuncupative or unattested written wills are still allowed as to *personalty* of soldier or sailor on active service, will of sailor or marine must be attested by certain officers to carry right to wages, pay, or prize money (1865).

Since *Mobilia sequuntur personam*, will of personalty should on principle satisfy *lex domicilii* of testator. But by Wills Act, 1861 (Lord Kingsdown's), wills of British subjects may be made (1) in U. K. according to Law of place where made, (2) out of U. K. according to Law of (a) place where made, or (b) actual domicile, or (c) original domicile.

Thus if a Scotchman settled in France makes his will in Austria, its form may be Austrian, French, or Scotch; if made in England or Scotland, English or Scotch respectively. And no subsequent *change* of domicile affects its validity or construction. Domicile is (1) of origin, or (2) of choice. The former depends generally on birth, following that of father. The latter is where a person has in fact and intentionally chosen a new *permanent* home—*i.e.*, settled for good in a different country.

Whole mass of personalty is often termed "personal estate"—a very different thing from saying that there can be "estate *in* personalty." Administration of such property or estate is by (1) executor, (2) administrator, or (3) Ch. D. Personalty (and realty since 1897) generally vests on death in executor, or in Court (P. D.) until appointment of administrator. Exceptions are (1) Interests ceasing at death, viz.: (a) Leaseholds with executory bequest over, (b) Pure personalty vested in trustees for life of deceased with trust over; (2) *Donatio mortis causâ* which vests absolutely and directly in donee on donor's death. This must be made by delivery of *possession* of personal chattel by donor with condition of vesting *property* in donee in event only of donor's death by existing disorder or other circumstance then contemplated as probable speedy cause of death. Delivery of chose in possession may be

(i.) actual to donee or his agent, or (ii.) constructive, *e.g.*, giving key of desk or box with *intention* of thereby giving dominion over contents. Delivery of chose in action must be such as to enable donee to sue at least in Equity, *e.g.*, where donor is payee or holder of cheque drawn by third person, or is drawer and cheque is then negotiated by donee *before* donor's death. Gift of bill payable to donor or order which falls due after his death is valid (*Re Mead*). Such donation differs from legacy, because (1) it cannot be proved as testamentary, and (2) it vests in donee without assent of executor or administrator. It differs from ordinary gift *inter vivos*, because it (1) is revocable during life, (2) is subject to donor's debts on deficiency of other assets, and (3) is subject to estate and legacy duty, as is now any gift *inter vivos* made within 12 months before death (1881, 1894).

A species of chose in possession apt to give trouble in administration is jewellery, especially when it has been delivered by husband to wife. 1. A particular jewel may possibly (though very rarely) be a true heirloom. 2. It may be a quasi-heirloom or "settled chattel."* 3. It may be absolute property of husband, only lent from time to time to wife, liable for his debts, not for hers. 4. It may, remaining legal property of husband, be subject to equitable trust,

* E. R. P., pp. 4, 5.

e.g., for wife for life, and after her decease for eldest daughter or otherwise (*Shaw* v. *Shaw*). 5. It may be legal separate property of wife, liable for her debts, not for his; and this when (a) bought out of her income or savings, (b) brought by her or other into settlement and secured thereby to her, (c) given her by a stranger, or (d) given her by her husband; and delivery of possession by him (at least since 1882) raises *primâ facie* presumption of 5 (d). 6. It may be *paraphernalia*, a form of property in which both husband and wife have interests. The term is defined as "apparel and ornaments of the wife, suitable to her rank and degree;" but such property is becoming "unfamiliar, if not antiquated." Where jewellery or other chattels are so constituted, of which *semble* there must be strong evidence, the wife has no disposing power, and the husband only *inter vivos;* if he pledges them and dies without redeeming, the wife has right to have them redeemed out of his estate. By his death they vest absolutely in her, subject to his debts only on deficiency of all ordinary assets of his.

I. Executor is *primâ facie* one so appointed by testator, expressly or "according to the tenor," *i.e.*, by any words implying that he is to pay general debts or otherwise administer. But "executor *de son tort*" is one who without any appointment has "intermeddled" beyond mere friendly or

neighbourly acts, and thus becomes liable to creditors and legatees without having privilege of "retainer." Since M. W. P. A., a wife can be executrix without husband's leave or compromising him by acting. Probate is neither refused on, nor revoked by, executor's bankruptcy, but receiver may be appointed. If he is infant, (1) administration *durante minore ætate* is granted to another; if out of U. K. at testator's death, there is (2) *a. durante absentiâ;* pending Probate action on validity of will, (3) *a. pendente lite.* If no executor appointed, or all predecease testator, or "renounce probate," or die before probate, or *after* probate stay out of U. K. till end of 12 months from death, (4) *a. cum testamento annexo* is granted, generally to residuary legatee. Lastly, if during administration sole executor die *testate,* his executor administers original will; if *intestate,* some representative of testator has grant of (5) *a. de bonis non (administratis)*; if one or more out of several die, administration belongs to survivors or survivor.

"Proving a will" is so termed because anciently only strict *proof* of its validity made in Court of "Ordinary," *i.e.*, Bishop, could displace his *primâ facie* right to administer goods. If there were *bona notabilia, i.e.*, £5 worth of goods in two dioceses of same province, will was proved in Prerogative Court; if in both provinces, it was proved in both.

Probate Court was substituted by Act of 1857; since J. A. will is proveed in (1) Principal Registry of P. D., or (2) in Registry of District where testator died. Where there is proper attestation clause, and validity is not disputed, probate is in "common form" on executor's oath, or (if no sufficient attestation clause) with addition of affidavit by one witness. If validity is challenged on ground of imperfect execution, forgery, insanity, fraud, undue influence, &c., it is proved in "solemn form *per testes*," *i.e.*, by action in P. D. brought (even after common form probate) any time within 30 years by person interested, all others being cited personally or by advertisement. And person interested may by *caveat* prevent probate in common form without notice to himself.

Not only general pure personalty, chattels real, and fee simple, vest in executor, but also rights of action on contract generally, of action for injury to personal estate in deceased's lifetime (1357); to his real estate within six months before death, action brought within year after death (1833); and for injury causing his death (1846). Damages thus recovered increase personal estate; those under Fatal Accidents Act solely for benefit of wife, husband, children, or parents. Estate may also be lessened by damages recovered in action brought within first six months of administration for injury

by deceased with six months before death to real or personal property of others (1833). All executors must join (1) in action, (2) if required, in transfer of Bank of England Stock; most other acts may be done by one acting singly, and this even before probate.

Executor must first pay funeral and testamentary expenses and debts out of personalty as primary fund, to extent of assets, in order of priority, viz., (1) Crown debts by specialty; (2) Rates and others with statutory priority; (3) Registered judgments against testator and unregistered against executor as such; (4) Specialty and simple contract debts *pari passu* but with preference of simple contract debts to Crown over those to subjects; (5) Voluntary bonds. He may *prefer* one creditor to another of equal degree, or even simple contract creditor over a specialty one, but cannot *retain* such debt due to himself on simple contract as against specialty creditor (*Wilson* v. *Coxwell*), even since Administration Act, 1869.

As "a man should be just before he is generous," debts precede legacies, and executor should not "assent" to vesting of legacy in legatee till satisfied of sufficiency of assets. Legacies are specific, demonstrative, general, or residuary. Specific is bequest of *particular* thing out of *testator's own* property, *e.g.*, "my horse Jupiter," "all money in

my desk," "sum due from A. B." Demonstrative (a mere variety of general legacy) is payable primarily out of specified fund; if that is insufficient, out of general assets, *e.g.*, "£100 out of money at X. Bank." General legacy may be of class of things not existing in form bequeathed as part of testator's property, *e.g.*, "a mourning ring worth £5," "£1,000 G. W. R. stock," either of which executor must, if possible, procure for legatee. More commonly it is general *pecuniary* legacy, *e.g.*, "£1,000 to A. B." Residuary legacy is one of uncertain amount, being whole or share of all personalty remaining after payment of debts and particular bequests of every kind. Residuary devises are specific, as testator is taken to know what land he has; residuary legacies are not, as a man's personalty is a floating amount varying from day to day. Specific legacies alone are liable to *ademption*, if testator between will and death has parted with specific property or *voluntarily* converted it into some other form, or if it has perished. Thus legacy of "my £1,000 G. W. R. preference stock," implying that testator has that exact amount, fails if before his death he has sold out and substituted £1,000 ordinary stock. But legacy of "my X. Co. debentures" is not adeemed if in interim the company has *compulsorily* converted them into stock. All legacies on deficiency of assets for paying debts

and legacies are liable to *abatement;* first general, then demonstrative on non-existence or insufficiency of particular fund, lastly specific.

In another view, legacies are (1) contingent; (2) vested *in præsenti*, payable *in futuro;* (3) vested, but defeasible on some *uncertain* event; or (4) vested indefeasibly and immediately payable. Interest is not payable on (1), unless (a) expressly directed, or (b) by way of maintenance from testator's death on legacy to his infant child. In other cases, even under (4), legacy is not (without express direction) bound to be paid till end of "executor's year" from testator's death; after this, if no later date for payment has been fixed by will, payment is enforceable with interim interest at 4 per cent. Court is said to lean towards construction which makes legacy vested rather than contingent. Thus, "to A. *when* he shall attain 21" taken by itself is contingent, but if interest meanwhile is given and no other words import contingency, it is vested (*Stapleton* v. *Cheales*), or if interest is meanwhile to be laid out for A.'s benefit at discretion of executor (*Hanson* v. *Graham*). But a *portion* "payable at 21" out of land will not be raised, if child die thereunder (*Pawlett* v. *Pawlett*).

Legacy to creditor, if not less than debt, is deemed *satisfaction* thereof; if less, it is *primâ facie* taken as *pro tanto* satisfaction of *portion* (*Ex*

parte Pye), but not of *debt* (*Talbot* v. *Shrewsbury*). Legacy to "children" includes only legitimate children, unless (1) illegitimate children are sufficiently identified, *e.g.*, by name, (2) they have gained reputation as children of supposed father, or (3) under state of facts at date of will no legitimate children could possibly take, *e.g.*, if supposed father had then already died unmarried. Also, legacy to "children of A." includes those legitimated *per subsequens matrimonium*, if both at their birth and at his marriage A. was domiciled in some country where such legitimation is legal (*Re Andros*). Legacy to infant or person beyond seas, if no particular directions, should be paid into Bank of England with privity of Paymaster General for investment on legatee's behalf.

Of the two exceptions to lapse under W. A., only the second* can relate to personalty. It should be noticed that "there is no residue of a residue," *e.g.*, if residue is bequeathed to A. and B., of whom A. predeceases testator, his share does not lapse to B. but as on intestacy to next-of-kin. Amount of personalty may be increased by notional conversion of land as from date of testator's death. If objects of conversion partially fail, as if a fund so created is bequeathed to several, some of whom predecease testator, there is resulting trust as to such shares

* E. R. P., p. 113.

which, so far as fund arises out of land, go to heir (*Ackroyd* v. *Smithson*) who takes it as he finds it, *i.e.*, under merely notional conversion, as land; under actual conversion by sale, as money (*Curteis* v. *Wormald*), so that if heir dies before receiving it, it goes in one case to his heir, in the other to his next-of-kin.

Any contingent legacy depends on some condition; when this consists in or involves something dependent on free will of legatee, it is commonly called a "conditional legacy." Conditions are "precedent," *i.e.*, instrumental in vesting legacy, or "subsequent," as defeating it after it has vested. If condition precedent is void by Statute or public policy, legacy (generally) fails to vest; if condition subsequent is similarly void, legacy becomes indefeasible. All such conditions are subject to Rule against Perpetuities. Condition subsequent attached to legacy or other gift of *personalty* must be followed by gift over; otherwise it is merely *in terrorem* (*i.e.*, alarming but ineffectual), and cannot defeat legacy. Common instances are legacies vested in trustees for benefit of son or daughter with gift over to another on such child marrying particular person or member of class, or marrying without consent of guardians, &c., or on bankruptcy. Condition absolutely restraining *second* marriage of man or woman is not against public policy (*Allen* v. *Jackson*).

Consent of several is generally satisfied by consent of survivors or survivor; if all die, condition fails and gift is indefeasible, except as to guardians, trustees, or the like, in which case new ones must be appointed by Court (*Re Brown's Will*). If condition *precedent in restraint of marriage* was originally void or becomes so, legacy (contrary to general rule) vests indefeasibly in despite of it.

Legacy may be to a class—*e.g.*, "children of A.," "my nephews and nieces." Such legacy vests in all members of class existing at death of *testator*, or if preceded by life interest, at death of *life-tenant* (*Viner* v. *Francis*). According to the two great canons of construction,* such words as "nephews," "cousins," "heirs," &c., will be construed strictly, if possible, but under various circumstances *may* include grandnephews, second cousins, next-of-kin, &c. An annuity may be bequeathed (1) as charge on whole estate or on particular fund, or (2) simply as annuity of £— p. a., when sufficient sum must be set aside by executor to provide such income by purchase from insurance company or otherwise for *life* of annuitant, if no longer or shorter term is expressed or implied.

Legatees pay share of *Estate* Duty, according to amount of whole real and personal estate, at progressive rates from fixed duty of £1 when legacy

* E. R. P., p. 112.

comes out of total between £100 and £200 up to eight p. c. when out of £1,000,000. No *Legacy* Duty is payable on legacies derived from estate less than £1,000 on which Estate Duty has been paid. Value of estate includes not only all property passing under will, but also *donatio mortis causâ* and gift *inter vivos* within year before death. No legacy duty is payable on legacy to member of Royal Family, and to or from husband, wife, and children. In all other cases, since 1881, even on legacies under £20, it ranges from three p. c. payable by brother, sister, or their descendants, up to ten p. c. by stranger or any relation more remote than great-uncle or aunt and their descendants. *Succession* Duty (not legacy duty) is paid on legacies charged on sale or mortgage of land, and on leaseholds. All or any of the three "Death Duties" may by express provision of testator be thrown on residue (if sufficient), executor being ordered to pay over any particular legacies free of such charges. It will be seen that rate of estate duty varies with value of whole estate; value of legacy and succession duty with nearness of relationship.

It seems needless to set out any example of a will of pure personalty, frame of which may be gathered *mutatis mutandis* from that given for real and personal combined.* Enough to say that regular order

* E. R. P., p. 117.

of gifts is specific legacies, general legacies and annuities, residuary bequest, followed by trusts (if any) of residue, and usual clauses for working these out.

II. Administrator under intestacy is officer of Court (Probate Division), deriving authority solely from Court grant of "Letters of Administration." These may be granted to widow, next-of-kin, or both, or to other chosen in discretion of Court, including creditor, but widower has *primâ facie* exclusive right to administer estate of intestate wife. Right of administration was once disputed between Crown and Ordinary; sometimes it was a franchise claimed by lord of manor. St. of Westminster the Second recognized Ordinary, by directing him to pay deceased's debts; St. of 1357 provided for appointment of ordinary's deputy, being one of deceased's "next and most lawful friends." Power of appointing was in 1857 vested in Probate Court, and now in P. D. On grant of letters of administration a higher stamp duty is payable than on probate, and administrator must give as security a bond generally with two sureties for double the alleged value of personalty. Property vests in him by and at his appointment. Powers and duties of administrator once appointed resemble those of executor; he has his "administrator's year," and till lately "retainer," which last is now supposed to

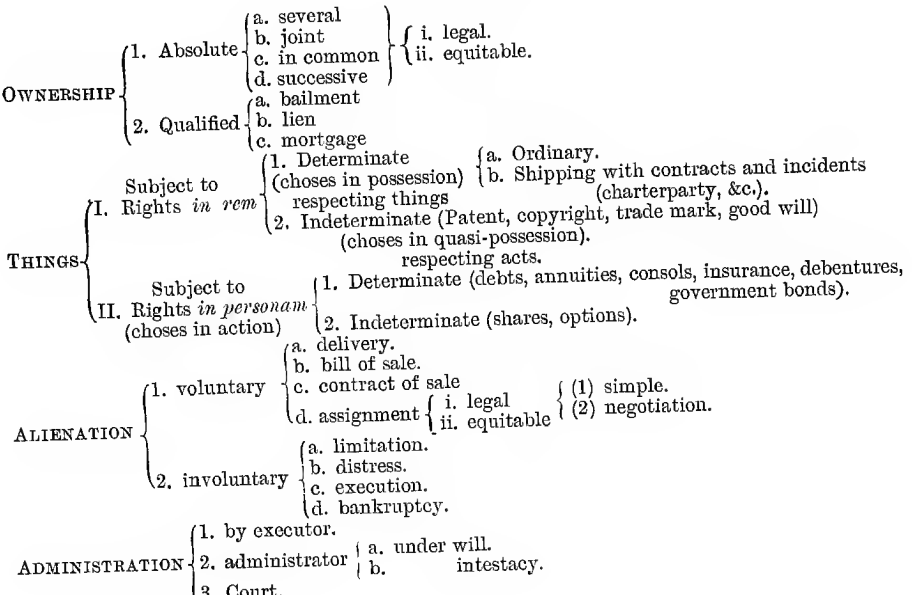
be taken away by engagement in his bond "not however to prefer his own debt." After paying debts he distributes residue among "next-of-kin according to the Statutes" (of Distribution) described elsewhere,* among whom are classed all issue of deceased children and issue, and children (not remoter issue) of deceased brothers or sisters, though these are not necessarily literal or natural "next-of-kin." Death Duties are payable at same rates by each of such next-of-kin, as by beneficiaries under will.

III. Administration by Court (Ch. D.) arises by action "for administration of trusts of will," payment of debts, ascertainment of disputed class of next-of-kin, &c.; or for certain purposes and in simple cases by originating summons. Such action is brought, or summons taken out, by executor or administrator on ground of substantial difficulty, or by unsatisfied creditor, or by real or alleged beneficiary. On decree or order for administration, office of personal representative is not suspended, but he must proceed thenceforth under supervision and direction of Court. Details of such proceedings must be sought under head of Equity. Here we note that for the time being enjoyment and control of property is interfered with; receiver is often appointed, and pending final settlement allowances

* E. R. P., p. 49.

may be paid under Order to legatees, &c., which may fall far short of their ultimate shares. On the other hand, costs properly incurred are in many cases payable out of the estate. In the result, administration by the Court may leave the corpus of the property either larger or smaller than it would have been in the hands of an unfettered personal representative.

ANALYSIS.


OWNERSHIP
1. Absolute
a. several
b. joint
c. in common
d. successive
i. legal.
ii. equitable.
2. Qualified
a. bailment
b. lien
c. mortgage
THINGS
I. Rights *in rem*
Subject to
1. Determinate (choses in possession) respecting things
a. Ordinary.
b. Shipping with contracts and incidents (charterparty, &c.).
2. Indeterminate (Patent, copyright, trade mark, good will) (choses in quasi-possession).
II. Rights *in personam* (choses in action)
Subject to
respecting acts.
1. Determinate (debts, annuities, consols, insurance, debentures, government bonds).
2. Indeterminate (shares, options).
ALIENATION
1. voluntary
a. delivery.
b. bill of sale.
c. contract of sale
d. assignment
i. legal
ii. equitable
(1) simple.
(2) negotiation.
2. involuntary
a. limitation.
b. distress.
c. execution.
d. bankruptcy.
ADMINISTRATION
1. by executor.
2. administrator
a. under will.
b. intestacy.
3. Court.

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